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Supreme Court, U.S.
FILED

No. 97 2067 JUN 19 1998

OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

Ernest A. Oliver

Petitioner

v.

Hydro-Vac Services, Inc.;
Golden Gallon, Inc.;
Guy Moose; Bill Foxworth;
ALC Incorporated, et al.,

Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

Ernest A. Oliver
Plaintiff/Appellant, Pro SE
58 Bohr Drive
Chattanooga, Tennessee 37415
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120 pp

QUESTIONS PRESENTED

1. Whether Tennessee Senior Federal District Court Judge James H. Jarvis violated Plaintiff/Appellant's due process rights by stripping him of his counsel, forcing him to proceed Pro Se, and filing a fraudulent Opinion protecting 82 companies, while at the same time, covering up the poisoning of the countries of Russia, Canada, and Mexico?

2. Whether the United States Supreme Court will allow the Sixth Circuit Court Of Appeals to turn a blind eye to the overwhelming evidence placed before it in the 823 pages of joint appendix filed in this matter?

LIST OF PARTIES

Petitioners:

Ernest A. Oliver, Plaintiff/Appellant, Pro Se

Respondents:

Hydro-Vac Services, Inc.;
Golden Gallon, Inc;
Guy Moose;
Bill Foxworth;

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PETITION FOR WRIT OF CERTIORARI

Petitioner Ernest A. Oliver, on behalf of himself, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in this case.

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OPINION BELOW

The Order of the United States Court of Appeals for the Sixth Circuit that gave rise to this petition was not recommended for full text publication by the Court. It is reprinted in the Appendix hereto at App. 1.

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JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered an ORDER on March 23, 1998. Pursuant to Supreme Court Rule 13.1, the present petition is timely, having been filed within 90 days after the entry of the ORDER.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

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CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, § 1 (Due Process Clause)

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SUPREME COURT RULE 10(a).

A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; **or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.**

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STATEMENT OF THE CASE

Introduction

This action was commenced by the Plaintiff/Appellant in August of 1991 against the Appellees and approximately (80) other Defendants, charging that Defendants engaged in an illegal hazardous waste dumping operation in the City of Chattanooga and a conspiracy to wrongfully terminate Plaintiff/Appellant from his employment with Defendant/Appellee Hydro-

Vac Services, Inc., and to deprive him of constitutionally protected rights, in violation of 42 U.S.C. § 1983 & 1985. When the investigation of Plaintiff/Appellant's allegations revealed that Defendant/Appellee Hydro-Vac Services, Inc. and its owner William Foxworth had been illegally commingling the wastes of over 80 companies and had contaminated the unlined Chattanooga Summit Landfill with at least 13 hazardous wastes in huge amounts, the conspiracy to cover-up the problem began. Foxworth had been operating Hydro-Vac Services, Inc. for over 18 months in direct violation of orders from the Air Pollution Board, and in direct violation of regulations of the City of Chattanooga, and the State and Federal environmental protection agencies, when the violations were discovered.

Defendant/Appellee, State Solid Waste Manager Guy M. Moose, conspired with attorneys William Colvin, Frederick Hitchcock, and James W. Gentry representing the Appellees herein, to cover-up the facts in this case and to defraud the Courts and the American Public as to the damage to the Landfill and the threat to the health and welfare of the general public both national and international.

When the case came before State Circuit Court Judge Samuel H. Payne, Plaintiff/ Appellant tape recorded a conversation with Judge Payne in order to prove the overwhelming conspiracy and abuse of the justice system in Tennessee. This tape recording and transcript was placed before the Sixth Circuit in Plaintiff/Appellant's Petition For Writ Of

Prohibition, Court of Appeals Case No. 97-5611. Judge Payne states he's not concerned about the hazardous waste dumping operation going on in his own district, and that he and other Judges in Chattanooga are not public protectors.

When the case came before Federal District Judge James H. Jarvis and revelations of the political damage and the embarrassment that could occur to the State of Tennessee and over 80 companies, Judge Jarvis joined the conspiracy as well. Judge Jarvis did not foresee that his protection of the dumping would have the potential to destroy the wholesome image of North America's largest private snack food company, Mckee Foods Corporation, manufacturers of Little Debbie® products, whose baking plants are located adjacent to the Landfill. Judge Jarvis not only threw out the case rendering an opinion based on fraud, but he issued an injunction against Plaintiff/Appellant preventing him from ever refiling the case even though the dumping operation is still going on. The conspiracy has continued from 1990 through the present time and has resulted not only in the loss of Plaintiff/Appellant's chemistry teaching position at Chattanooga State Technical Community College (herein "CSTCC"), but also in slander and libel against Plaintiff/Appellant's scientific abilities and expertise. A right to sue letter was issued by the EEOC against CSTCC on May 2, 1996 resulting in the Plaintiff/Appellant's Federal lawsuit at Case No. 1:96-Cv-380 against CSTCC before the Honorable Thomas G. Hull. Judge Hull dismissed Plaintiff/Appellant's Count II alleging

conspiracy between CSTCC, Defendant/Appellees and their attorneys, and others, for conspiracy to violate Plaintiff/Appellant's civil rights. Judge Hull stated Plaintiff/Appellant's Count II was a collateral attack on Judge Jarvis's previous order enjoining Plaintiff/Appellant from:

> "... filing any further pleadings in this case and any further pleadings in the United States District Court for the Eastern District of Tennessee arising out of the facts set forth in this lawsuit..."

However, Honorable Thomas G. Hull also made the following statement in his order of December 18, 1996 with respect to the case before Judge Jarvis:

> "... there is a suggestion in the record that Judge Jarvis may have relied upon a false affidavit in dismissing the previous lawsuit..."

Plaintiff/Appellant then filed a Motion to Set Aside Orders on January 17, 1997 which was denied by Judge Jarvis by his Final Order of January 31, 1997. This Final Order was appealed by Plaintiff/Appellant within 10 days under Rule 60, Federal Rules of Civil Procedure and Rule 4, Federal Rules of Appellate Procedure.

On May 19, 1997, Plaintiff/Appellant filed a Petition For Writ Of Prohibition against Judge Jarvis as Court of Appeals Case No. 97-5611, which was denied by the Sixth Circuit.

Judge Jarvis was given the opportunity by the Sixth Circuit to respond to the charges in said petition. On Friday, June 6, 1997, Plaintiff/ Appellant was informed by the Clerk of the Court that Judge Jarvis had returned the certified docket as requested by the Court but had submitted no cover letter and no response.

BACKGROUND FACTS

On **August 27, 1990**, Plaintiff/Appellant Ernest A. Oliver ("Oliver") was fired from his position of Lab Director at Hydro-Vac Services, Inc., a Chattanooga, Tennessee based nonhazardous waste water treatment facility ("Hydro-Vac"). Oliver was fired for blowing the whistle on illegal activities regarding the improper disposal of both hazardous and nonhazardous wastes. Oliver requested an investigation by the U.S. Department of Labor which resulted in a hearing before ALJ Honorable Ralph Musgrove on **January 22 and January 23, 1991**. Judge Musgrove died immediately following the hearing and Oliver appealed the replacement ALJ's decision which had been based on Moose's perjury. on **November 1, 1995**, U.S. Secretary of Labor, Dr. Robert Reich, reversed the replacement ALJ's decision and ordered Hydro-Vac to reinstate Oliver stating Hydro-Vac had illegally fired Oliver from his lab director position. On **February 19, 1997**, Honorable Daniel A. Sarno, Jr. ordered Hydro-Vac to pay Oliver $43,000.00 in back pay and front pay plus interest for illegally firing Oliver.

During Oliver's employment at Hydro-Vac and after his termination, he gathered significant evidence in the form of documents, pictures, tape recordings, and video tape to prove not only his allegations of illegal disposal of hazardous wastes, but moreover, that a conspiracy which began in 1990 is still continuing, and has today become so large as to infect the Tennessee State and Federal Court systems, the FBI, the Department of Justice and Offices of U.S. Attorney General Janet Reno, Vice-President Albert Gore, Jr., and the Clinton Administration.

Defendant/Appellee, Guy M. Moose ("Moose"), is Director of the Southeast Regional Office, Division of Solid Waste Management for the State of Tennessee, located in Chattanooga. During the period of **August 1990 through January 1991**, Moose and his office investigated Oliver's allegations of illegal dumping of hazardous wastes by Hydro-Vac and found that Hydro-Vac had violated the Tennessee Hazardous Waste Management Act and the Tennessee Solid Waste Management Act. Moose cited Hydro-Vac on at least three (3) different occasions, which included allowing wastes containing 40 C.F.R Subpart C hazardous wastes to migrate into the Chattanooga Creek. Moose withheld all of this information from Oliver at the labor hearing before ALJ Musgrove and he testified under oath at the Federal Labor Hearing on **January 23, 1991** that no hazardous wastes were present at Hydro-Vac.

Attorney Frederick L. Hitchcock ("Hitchcock"), who represented Golden Gallon, Inc. in the case, had provided clear proof to Judge Jarvis in his affidavit of September 23, 1992, that Hitchcock was fully aware that his client Golden Gallon's gasoline contaminated dirt had become hazardous by Federal standards, as more specifically defined in City of New York v Exxon Corp., 766 F.Supp. 177 (S.D.N.Y. 1991). Hitchcock admits at paragraph 3(c) of his affidavit that:

> "...the petroleum-Contaminated Soil was mixed with some waste other than petroleum from an underground storage tank installation..."

Hitchcock also admits at paragraph 3(b) that:

> "Contaminated soil from underground storage tank installations and other materials such as absorbent pads used to clean up petroleum spills are not subject to regulation as hazardous waste, even though the petroleum in the soil or other materials contains chemical substances, such as benzene and toluene, that would separately subject to regulation as hazardous waste. 40 C.F.R. 261.4(b)(10) and TDEC Rules 1200-1-11.02(1)(d)(vii)

Hitchcock further states that he hired a geologic and environmental consulting firm to examine the petroleum-contaminated soil, and that it was determined that other constituents were present other than contamination from petroleum underground storage tanks. Hitchcock

states that the Golden Gallon contaminated soil was then placed in "roll-off boxes" on Hydro-Vac's premises and that he had shared the information from the consulting firm with the Tennessee Department of Environment an Conservation (i.e., Moose).

It is a fact that the City of Chattanooga has identified hazardous wastes benzene and dichloroethylene- and three metals- mercury, cadmium and barium in monitoring wells at the Summit Landfill.

It is a fact that Moose and the Tennessee Department of Environment and Conservation identified benzene, mercury, cadmium, and barium at Hydro-Vac in wastes being prepared to be land filled at the Summit Landfill.

It is a fact that on **September 21, 1990**, Jim Templeton with the City of Chattanooga Summit Landfill, advised Hydro-Vac that it would no longer accept any waste unless specifically authorized by the Division of Solid Waste Management in writing. This information in an inter-office memo of Moose, was also withheld by Moose from Oliver at the Federal Labor hearing held before ALJ Musgrove on **January 23-24, 1991**.

It is a fact that Mr. Rick Brown, Solid Waste Manager for the Tennessee Department of Environment and Conservation in Knoxville, in his letter to Hydro-Vac general manager Tom Cochran on **March 6, 1991**, admonishes Hydro-Vac

for receiving hazardous wastes on at least two (2) occasions and states:

> "...your facility is not authorized to receive and treat hazardous wastes generated by others..."

All of the documents referred to above were presented to the Sixth Circuit in the three volume, 823 page joint appendix.

In 1992, Vice-President Albert Gore, Jr. at the United Nations 1992 Earth Summit in Rio de Janeiro, told the whole international community that Chattanooga is the "Environmental City" of the future. In a speech he stated: "...I believe Chattanooga does rightfully serve as an example this country can hold up to the rest of the world." The fact that 82 companies were involved in illegal hazardous waste dumping in the so-called "Environmental City", suddenly became a serious problem. However, the fact that the health and welfare of persons not only in North America, but also in the countries of Russia, Canada, and Mexico, has been placed at risk by "Dirty" Little Debbie® products baked in the Chattanooga area, has caused this issue now to become a **REGIONAL COVER-UP!**

It is a fact that lawyers for McKee Foods corporation admit on tape recorded conversation, that they are aware of the contamination of the water at the Summit Landfill but did not know that it was in the air too, and that Plaintiff/Appellant has dropped a "BOMB SHELL" on McKee Foods

Corporation. Furthermore, McKee Attorney Gary Lander has stated in certified Air Pollution Records that Oliver is attempting to get McKee Foods Corporation to sue him for libel and slander so he can win his case on the merits in a counterclaim.

It is a fact that instead of fixing the problem of the hazardous wastes contaminating their Little Debbie® products, McKee Foods Corporation has relied on the conspiracy and protection of powerful judges and politicians to cover-up the danger to the health and welfare of their customers, and have recently built a third baking plant in the center of the hazardous pollution and have for the past two years been shipping their "Dirty" Little Debbie® products to Russia, Canada, and Mexico.

REASONS FOR GRANTING THE PETITION

I.

JUDGE JARVIS VIOLATED PETIONEER'S DUE PROCESS RIGHTS AND FILED A FRAUDULENT OPINION, KNOWING IT TO BE FRAUDULENT, FOR THE SOLE PURPOSE OF PROTECTING THE IMAGE AND ORGANIZED CRIME OF 82 COMPANIES, THE IMAGE AND CRIMINAL NEGLIGENCE OF MCKEE FOODS CORPORATION AND ITS LAWYERS, THE IMAGE OF THE CITY OF CHATTANOOGA AND THE STATE OF TENNESSEE, AND THE IMAGE OF ENVIRONMENTAL VICE-PRESIDENT FROM TENNESSEE, ALBERT GORE, Jr.

It is a fact that Judge Jarvis issued a fraudulent **Memorandum Opinion** on August 10,

1992, App. 5, stating on page 13 that: "...Moose concludes that **all** of Mr. Oliver's allegations were "groundless"..."(emphasis added). Nowhere in the record of this case is there any evidence, whatsoever, to even remotely support such a statement. In order for Judge Jarvis to be able to support his injunction preventing Plaintiff/Appellant from refiling his lawsuit, Judge Jarvis had to create a myth which would suggest that Plaintiff/Appellant was absolutely wrong in his actions of filing a citizen's suit against 82 companies. Judge Jarvis had to show that not even one allegation made by Plaintiff/Appellant was true. To do so, Judge Jarvis had to enter into a conspiracy with defense Attorneys William Colvin, Frederick Hitchcock, James Gentry, and State Solid Waste Manager Guy Moose, to ignore the overwhelming facts and documents signed by Moose and his office, which Plaintiff/Appellant submitted as evidence **PRIOR TO** Judge Jarvis's Memorandum Opinion on August 10, 1992, App.5, and again in Plaintiff/Appellant's Motion To Set Aside Orders which Judge Jarvis denied on January 17, 1997. All four (4) men and Judge Jarvis were fully aware that Judge Jarvis's statement: "...Moose concludes that **all** of Mr. Oliver's allegations were **"groundless"**. ..." (emphasis added) was and is **A BLATANT MISSTATEMENT OF THE TRUTH**!

Judge Jarvis intimidated Plaintiff/ Appellant's Michigan lawyer, Mark Light, into abandoning his client and refusing to appeal the Memorandum Opinion filed by Judge Jarvis on

August 10, 1992, App.5. Judge Jarvis approved attorney Light's request to withdraw without any notice whatsoever to Plaintiff/Appellant Oliver.

Judge Jarvis incorrectly applied Hallstrom v. Tillamook County, 493 U.S. 20,22,110 S.Ct. 304, 307, 107 L.Ed.2d 237 (1989), as the standard by which he bases his opinion, and his justification for sanctions and dismissal of Plaintiff's case. Plaintiff/Appellant submits that Hallstrom specifically indicates it does not apply under 42 U.S.C. 6972(b)(1)(A)(iii) when "subchapter III violations" (i.e., RCRA Subpart C violations) are occurring. In Dague v. City of Burlington, 935 F.2d 1343 (2d Cir. 1991), and in Martin v. Kansas Board of Regents, 32 Env't Rep. Cas. (BNA) 1944 (D. Kan. Feb. 19, 1991), the courts held that no 60- day notice was necessary when "RCRA Subpart C violations" have occurred.

At pages 19 and 20 of Judge Jarvis's Memorandum Opinion at App.5, Judge Jarvis shows that he is not only capable of outright lying in his opinion, but is also capable of ignoring the most important part of Guy Moose's affidavit found at Court Docket #25, in regard to Plaintiff's rights. Judge Jarvis quotes paragraphs 2 , 3, and 15 of Moose's affidavit to support his outrageous statement that:

> "...Moose concludes that **all** of Mr. Oliver's allegations were "groundless". ..."(emphasis added)

Not only did Moose say nothing of the kind, but Judge Jarvis conveniently leaves out paragraph 14 of Moose's affidavit where Moose admits to citing Hydro-Vac for:

> "...The relief sought by Mr. Oliver in his prayer under Count I was, in fact, invoked by me and the State of Tennessee through a "permit by rule" procedure in the Fall of 1990, without any request from Mr. Oliver for such an action and not because Mr. Oliver had been discharged by HVSI at an earlier time..."

Here Moose is referring to his citing of Hydro-Vac on **January 22, 1991** for allowing oil from UST contaminated soil to migrate into the Chattanooga Creek. This citation is part of the **Record Of Appeal** and can be found in the joint appendix at page JA258. Judge Jarvis ignores the fact this oil migrating into the Chattanooga Creek from gasoline-contaminated dirt (UST Soil), contained "RCRA Subpart C" hazardous wastes benzine and toluene. The fact that these compounds are listed as hazardous wastes is further confirmed by Golden Gallon's attorney Hitchcock in his affidavit of September 23, 1992, found in the joint appendix at JA300 and previously introduced above under **STATEMENT OF FACTS**.

Therefore, because "RCRA Subpart C violations" were occurring at Hydro-Vac, Hallstrom v. Tillamook County cited by Judge Jarvis does not apply. The correct law should have been the standard cases Dague v. City of Burlington Supra, and Martin v. Kansas Board

of Regents Supra, where the courts held that no 60-day notice was necessary when "RCRA Subpart C violations" had occurred.

ANYONE WITH ANY COMMON SENSE AT ALL WOULD REALIZE THAT ALLOWING THE NAVIGABLE WATERS AND THE GROUNDWATER OF A CITY LIKE CHATTANOOGA TO BE POLLUTED WITH THE CANCER-CAUSING HAZARDOUS WASTES BENZINE AND MERCURY FOR 60 DAYS BEFORE ANY ACTION COULD BE TAKEN, WOULD BE CRIMINAL!

Plaintiff/Appellant specifically brought this to the attention of Judge Jarvis on September 16, 1992 at Docket #70, found in the joint appendix at page JA229. Judge Jarvis confirms that he is aware of this information when he states in his Memorandum Opinion of December 28, 1992 at Docket #98 on doc. Nos. 70 and 83 that:

> "...However, apparently unwilling to acknowledge this fact, plaintiff, proceeding pro se, has continued to file pleadings arguing that Count I is meritorious and that, therefore, the complaint was not frivolous and should not have been dismissed [see Docs.No. 70 and 83]."

On September 16, 1992 at Docket #70, Oliver filed his Motion to Deny Defendant's Motion For Sanctions with exhibits 1-17. Exhibit #9 is the Notice of Violation under the Solid Waste Management Act filed by Moose which charges Hydro-Vac with allowing oil from UST contaminated soil (roll-off boxes) to migrate into the Chattanooga Creek. Exhibit #10 is the

Notice of Violation under the Tennessee Hazardous Waste Management Act which was filed against Hydro-Vac by Moose's office on December 5, 1991 and charges Hydro-Vac with processing wastes that are hazardous for "Ignitability". Both of the above cited violations were for compounds that were hazardous for the characteristic of "ignitability".

In City of New York v Exxon Corp., 766 F.Supp. 177 (S.D.N.Y. 1991) at page 184, the Court establishes that under the RCRA regulations two(2) separate and independent standards exist for determining whether a substance is a hazardous waste. Subpart C of RCRA regulations provides that a waste is hazardous if it exhibits any of the characteristics of ignitability, corrosivity, reactivity, or EP toxicity. (See 40 C.F.R.§§ 261.20-261.24). Subpart D, on the other hand, is a list of both specific wastes and general waste categories which are considered RCRA hazardous wastes. (See 40 C.F.R. §§ 261.30-261.33). Under CERCLA'S definition of "hazardous substance", a hazardous substance includes any waste which falls under any of the various definitions and listings of hazardous wastes under other statues including RCRA and CWA. 42 U.S.C. § 9601(14).

In City of New York v Exxon Corp., 766 F.Supp. 177 (S.D.N.Y. 1991) it is absolutely clear that CERCLA liability is established in a multigenerator, multihazardous substance case, such as the immediate case, if the Plaintiff can establish that the defendant (1) disposed of its hazardous substances, (2) at a

facility which now contains hazardous substances of the sort disposed of by the generator, (3) if there is a release of that or some other type of hazardous substance, (4) which causes the incurrence of response costs. Plaintiff/Appellant submits that there is absolute proof that Hydro-Vac received and commingled gasoline-contaminated soil with hazardous "used oil" and also "waste oil" along with wastes from over 80 companies. This waste was land filled in the Chattanooga Summit Landfill over a period of 18 months until Plaintiff/Appellant blew the whistle in August of 1990.

The fact that Moose cited Hydro-Vac for having allowed this waste in "roll-off" boxes to migrate into the Chattanooga Creek is a second "RELEASE" in addition to the first "RELEASE" into the Chattanooga Summit Landfill. The fact that the City of Chattanooga has identified the same hazardous wastes in wells located at the Summit Landfill as these hazardous wastes that Moose and the Department Of Environment and Conservation had identified at Hydro-Vac during their inspections of Hydro-Vac in 1990, satisfies all the requirements under CERCLA to require all 82 companies listed in Plaintiff/Appellants complaint in the immediate case to clean up the Landfill.

The Affidavit of Hydro-Vac employee, Randall Blevins, App.26, and also found in the joint appendix at JA271, establishes the mixing of different wastes, and the land filling of said wastes at the Summit Landfill. Also, Mr.

Blevins establishes just how outrageous and illegal the operation was at Hydro-Vac.

II.

WHETHER THE UNITED STATES SUPREME COURT WILL ALLOW THE SIXTH CIRCUIT COURT OF APPEALS TO TURN A BLIND EYE TO THE OVERWHELMING EVIDENCE PLACED BEFORE IT IN THE THREE VOLUMES AND 823 PAGES OF JOINT APPENDIX FILED IN THIS MATTER?

On March 23, 1998, Sixth Circuit Judges Boggs,Norris, and Moore entered their Order App.1, denying Plaintiff/Appellant's request and in doing so listed a series of **inaccurate statements** regarding the facts in this case. The Order states:

> "In his timely appeal from the denial of his Rule 60(b) motion, Oliver argues that the statue of limitations for Rule 60(b) should be tolled due to a continuing conspiracy, that the Attorney General_ should not have been permitted to represent the State of Tennessee without recording his appearance, that the filing injunction has allowed the defendants to defame him, and that the district court erred by not allowing him to speak at the sanctions hearing. He also requests oral argument."

The court then makes the exradionary statement citing Foster v. Barilow, 6F.3d 405, 407(6th Cir. 1993), that because Oliver did not raise the issues in the above quote, the Court will not address an issue not first raised in the district court.

Plaintiff/Appellant charges here that his due process rights have been violated. The above quote is a perfect example to support these allegations.

None of the issues stated by the court in the above quote had occurred at the time for Plaintiff/Appellant to raise them. If the sixth Circuit judges had taken the time to read Plaintiff/Appellant's timely filed brief, App.33, they would have realized that only during the next four years did the defemination occur, or that Plaintiff/Appellant learned that Attorney James Gentry representing Guy Moose, was also representing the State of Tennessee. Furthermore, Plaintiff/Appellant has never been allowed to speak in any court, State or Federal, and State Circuit Court Judge Samuel Payne is on tape recording stating that he also did not read anything filed before him by Plaintiff/Appellant in this matter.

On January 20, 1997, three days after Judge Jarvis denied Plaintiff/Appellant's Motion To Set Aside Orders, Plaintiff/Appellant sent his Registered Letter, #R 838 493 627, App. 73, to Judge Jarvis describing in detail the facts regarding the contanimation of the Summit Land Fill and **MOREOVER**, the damage to

McKee Foods Corporation, and the threat to the health and welfare of the **NATIONAL** and **INTERNATIONAL** communities. Judge Jarvis and other high ranking public officials have decided to ignore the facts.

If a Court of law makes up the facts as it goes, as did Judge Jarvis in this matter, and the Sixth Circuit not only allows this to occur but also makes up the facts as it goes, Plaintiff/Appellant submits his Constitutional Rights to Due Process have been violated.

What proof does Petitioner have that both the District Court and the Sixth Circuit Court knowingly filed statements that were contrary to **Known Facts** before them?

Judge Jarvis stated in his August 10, 1992 **Memorandum Opinion,** App.5, that "...Moose concludes that all of Mr. Oliver's allegations were "groundless"..."

Docket # 70 Pltf.'s Motion to deny defts.' motions for sanctions, w/exhibits 1-17 before Judge Jarvis, clearly show that Moose had cited Hydro-Vac Services, Inc. For everything Plaintiff/Appellant had alleged and much more. **Furthermore, at pages JA223-229 of the 823 page, three volume joint appendix before the Sixth Circuit, the same evidence can be found.**

The most extradionary evidence of the violation of Plaintiff/Appellant's **DUE PROCESS RIGHTS** is the statement by the Sixth Circuit Judges in their Order, App.1, that:

> "Although he refers to a 1996 letter from his attorney alleging that defendant [Moose] committed perjury, he provides no evidence to support the allegation of perjury"

Again, the Sixth Circuit Court Judges Boogs, Norris, and Moore either lied outright about pages 223-299 of the joint appendix, or they didn't read Plaintiff/Appellant's brief, App.33. They further state:

> "Oliver has not provided evidence of conduct by any officer of the court that was intentionally false, wilfully blind to the truth, or in reckless disregard of the truth."..."Instead, he primarily made frivolous allegations as to post-judgment events."

On May 4, 1998, Respondent Hydro-Vac Services, Inc. Paid Plaintiff/Appellant $25018.00 as the final order of the Secretary of Labor. The letter from Shumacker & Thompson, Attorneys for Respondent Hydro-Vac Services, Inc. confirming this payment, is found at App.68.

Judge Jarvis states in the footnote at page 2 of his **Memorandum Opinion** of August 10, 1992, at App. 5, that:

> "Plaintiff has filed two other actions as a result of his being fired by HVSI. On September 24, 1990, Plaintiff commenced an action

> before the United States Department of Labor claiming retaliatory, discriminatory discharge under various employee protection provisions of numerous federal environmental statutes. The first stage review by the Department of Labor resulted in a finding that there had been no retaliatory, discriminatory discharge by HVSI. Plaintiff then filed an appeal with the chief administrative law judge and was afforded a de novo hearing in January, 1991, which was heard over a two-day period. The record in that case is closed and a recommended decision and order from the administrative law judge was issued January 21, 1992. [See Doc.14, Exh 4.] The administrative law judge, Robert M. Glennon, found that HVSI "had legitimate and non-discriminatory reasons to discharge [Plaintiff]...because he "performed poorly at his job and...disrupted the organization" [See id.].

Plaintiff/Appellant submits that Judge Jarvis was made fully aware at the time of his **Memorandum Opinion** on August 10,1992, App.5, that the decision of judge Robert M. Glennon had been appealed and was **based on Guy Moose's perjury**. MOREOVER, Judge Jarvis was made fully aware that Secretary of Labor, Dr. Robert Riech had on November 1, 1995, **REVERSED JUDGE GLENNON'S ORDER** and ordered Hydro-Vac Services

to reinstate Plaintiff and pay back pay! The Secretary of Labor's opinion confirmed the violations of Federal Environmental Laws by HVSI.

Again, Judge Jarvis was fully aware of the truth and complete facts regarding this matter from the letter sent to him by Plaintiff/Appellant on January 20, 1997 Registered Mail #R 838 493 627, App.73.

The Sixth Circuit Court in it's order of March 23, 1998, App. 1,states that "perjured testimony alone does not constitute a fraud upon the court. Judges Boggs, Norris, and Moore also state that Plaintiff/Appellant "Oliver failed to cite to any authority suggesting that Rule 60(b) statue of limitations can be tolled by a continuing conspiracy.

Plaintiff/Appellant submits that this statement is patently false and **absolutely provable!** The Annotation of the American Law Review, 97 A.L. R. 137, is listed at page ii of Plaintiff/Appellant's brief at App.33. It is also found at page ZA455 of the 823 three volume joint appendix filed before Judges Boggs, Norris and Moore, Furthermore, at page 17 of said brief before judges Boogs, Norris, and Moore, at App. 58, question V. "What specific issues do you wish to raise on appeal?" Plaintiff/Appellant states that:

> a) "Plaintiff/Appellant wishes to bring to the attention that according to the authority of the **Annotation of the American Law**

> **Review,** 97 A.L.R. 137, all matters in this case that could be challenged as untimely due to the **Statue of Limitations**, should be tolled due to the continuing conspiracy that began in 1990 and is continuing today."

The statement by Judges Boggs, Norris, and Moore that "Oliver failed to cite to any authority suggesting that Rule 60(b) statue of limitations can be tolled by a continuing conspiracy" is just as **outrageous** as Judge Jarvis statement "Moose concludes that all of Mr. Oliver's allegations are "groundless" ." It is a violation of Plaintiff/Appellant's **due process rights** because the judges either did not read the brief at App. 33, or, like Judge Jarvis, lied outright about the facts in Plaintiff/Appellant's Appeal.

Plaintiff/Appellant submits the United States Supreme Court has a duty to protect the health and welfare of U.S. citizens and a moral obligation to protect the International Community as well. Furthermore, the United States Supreme Court has a legal and moral duty to supervise and correct the violation of the constitutional rights of a U.S. Citizen who tries to protect the health and welfare of the general public both national and international **EVEN IF IT GOES AGAINST THE WISHES OF TENNESSEE SENIOR FEDERAL DISTRICT JUDGE JAMES H. JARVIS AND ENVIRONMENTAL VICE-PRESIDENT AL GORE, Jr.**

Judge Jarvis actions in this matter which have now been condoned by Sixth Circuit Court Judges Boggs, Norris, and Moore cannot be defended and cannot be denied when examined against the 823 page three volume joint appendix filed in this case.

IT IS PLAIN AND SIMPLY A BLATANT COVER-UP!

The fact that this cover-up is protecting the contamination of food products that are being consumed by Americans, Canadians, Mexicans, Russians, and all the U.S. Military Bases all over the world is **HATEFUL** and **REPREHENSIBLE!**

IT MAY NOT BE A FRAUD AGAINST THE COURT, BUT IT IS CERTAINLY A FRAUD AGAINST THE COUNTRIES OF RUSSIA, CANADA, AND MEXICO!

There is a **CANCER** on the United States Federal Court System in the presence of Tennessee Senior Federal District Judge James H. Jarvis. If the United States Supreme Court does not exercise it's supervisory duty in this matter, the exposure of the truth herein to the National and International Communities being threatened by the contamination of "DIRTY" LITTLE DEBBIE® products baked in the Chattanooga area, will forever taint the Honor, Integrity, and Credibility of the United States Federal Court System.

As I stated in my brief to the Sixth Circuit Court, App.33, As a member of the United States Public Health Association, I have a duty to see

that the health and welfare of innocent persons is not placed at risk by the Criminal Negilence, Conspiracy to Obstruct Justice, and the Protection Of Organized Crime that has become the Rule in the State of Tennessee.

The Sixth Circuit erred in upholding Judge Jarvis's Opinion and injunction, and should be reversed.

Respectfully Submitted,

Ernest A. Oliver

Ernest A. Oliver
Plaintiff/Appellant, Pro Se
58 Bohr Drive,
Chattanooga, TN 37415
(423) 877-8723

No. 97-5354

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ERNEST A. OLIVER

Plaintiff/Appellant

v. **ORDER**

HYDRO-VAC SERVICES, INC.; GOLDEN GALLON, INC.; GUY MOOSE; BILL FOXWORTH; ALC INCORPORATED, et al.,

Defendants/Appellees.

Before: BOGGS, NORRIS, AND MOORE, Circuit Judges.

Ernest A. Oliver, proceeding pro se, appeals a district court order dismissing his motion to set aside orders filed pursuant to Fed R. Civ. P. 60(b). This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed Fed R. App P. 34 (a).

Seeking monetary and equitable relief, Oliver sued eighty-seven defendants. He

asserted that: 1) the defendants had violated the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§6901, *et seq.*; 2)the defendants had "violated" 42 U.S.C. § 1983; and 3)the defendants conspired to illegally dump waste in violation of state law. After dismissing eighty-three defendants because Oliver had failed to serve them, the district court granted summary judgment in favor of the remaining defendants (Hydro-Vac Services, Inc., Golden Gallon, Inc., Guy Moose, and Bill Foxworth) in an order entered August 10, 1992. Thereafter, in an order entered December 28, 1992,the district court awarded sanctions in favor of the defendants, enjoined Oliver's attorney from filing pleadings in the district court for three years, and enjoined Oliver from filing any other pleadings arising from the same allegations. Oliver did not appeal the order of August 10, 1992, or the order of December 28, 1992. Over four years later, on January 22, 1997, Oliver filed a Rule 60(b) motion to set aside the orders and reinstate the second claim. The district court denied the motion.

In his timely appeal from the denial of his Rule 60(b) motion, Oliver argues that the statute of limitations for Rule 60(b) should be tolled due to a continuing conspiracy, that the Attorney General should not have been permitted to represent the State of Tennessee without recording his appearance, that the filing injunction has allowed the defendants to defame him, and that the district court erred by not allowing him to speak at the sanctions hearing. Unless exceptional circumstances are present,

this court will not address an issue not first raised in the district court. *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993). No exceptional circumstances exist in this case.

We note that we cannot review whether the district court erred by dismissing the complaint or by awarding sanctions. Oliver's notice of appeal was not filed in time to trigger appellate review of the underlying judgment, and thus, this court may only review the order denying the Rule 60 motion. See *Peake v. First Nat'l Bank and Trust Co.*, 717 F.2d 1016, 1019-20(6th Cir. 1983).

We conclude that the district court did not abuse its discretion by denying Oliver's motion for relief from judgment. See *Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir. 1993); *Whitaker v. Associated Credit Servs.*, 946 F.2d 1222, 1223 (6th Cir. 1991). Oliver's motion is time-barred because a motion asserting fraud must be brought within one year of the judgment. Fed R. Civ. P. 60(b). As the judgment was entered on August 10, 1992, Oliver had until August 10, 1993, to file his motion. Oliver did not file his motion within a year, but instead waited over four years. Oliver failed to cite any authority suggesting that Rule 60(b) statue of limitations can be tolled by a continuing conspiracy.

We also conclude that Oliver has not sufficiently alleged fraud upon the court such that the district court should have entertained an independent action under the savings clause of Rule 60(b). Oliver has not provided evidence of conduct by any officer of the court that was intentionally false, wilfully blind to the

truth, or in reckless disregard of the truth. See *Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993), cert. Denied, 513 U.S. 914 (1994). Instead, he primarily made frivolous allegations as to post-judgment events. Although he refers to a 1996 letter from his attorney alleging that defendant committed perjury, he provides no evidence to support the allegation of perjury. Futhermore, perjured testimony alone does not constitute a fraud upon the court. See *Hazel-Atlas Glass Co. V. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944).

Accordingly, the request for oral argument is denied, and the district court's judgment is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

S/_____

Clerk

App. 5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

ERNEST OLIVER,	)	**FILED**
Plaintiff	)	**Aug 10 10:24 AM '92**
	)	**U.S.DISTRICT COURT**
v.	)	**EASTERN DIST.TENN.**
	)	**By MG Dep.Clerk**
HYDRO-VAC SERVICES, INC.	)	
Et al.,	)	Civ. 1-91-0354
Defendants	)	

MEMORANDUM OPINION

Plaintiff filed his complaint on August 26, 1991 setting forth three causes of action. Count I seeks injunctive relief for violations of "42 USC 6972 [sic]",[1] which is obviously in reference to the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6901, et.seq. ("RCRA"). Count II of the complaint seeks compensatory and punitive damages for violations of plaintiff's civil rights pursuant to "42 USC 1983"[sic]. Count III of the complaint seeks compensatory and punitive damages under a "pendant [sic] state claim " for "conspiracy."

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[1]The Court notes at the outset that the complaint is poorly drafted from a grammatical, procedural, and substantive standpoint. In Count I, for example, plaintiff alleges that

This action was originally filed against 87 defendants. All but four have been dismissed pursuant to Rule 4(j), Federal Rules of Civil Procedure, for plaintiff's failure to serve a copy of the summons and complaint upon them

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this is a "whistleblower [sic] law suit [sic] pursuant to 42 USC 6972" [sic]. However, 6972 embraces the citizen suit provision of the Resource Conservation and Recovery Act of 1976 ("RCRA") while the "whistle blower" provisions of the RCRA are set forth at 42 U.S.C. 6971. Plaintiff's description of Count I is therefore ambiguous. Nevertheless, because plaintiff makes no mention whatsoever of any statue except 6792 either in the complaint or on the civil cover sheet and because the relief he seeks is relief he could only pursuant to 6972, the court will treat Count I as a citizen suit action brought pursuant to 6972. Moreover, it must be emphasized that plaintiff has two attorneys representing him and that this ambiguity was pointed out in defendant's motions. Yet, plaintiff has made no motion to amend his complaint, although his attorneys make several vague references in their briefs about reserving the right to do so in the event that the court deems it necessary [see, for example, Doc. 44, p.10]. This court does not intend to advise plaintiff's counsel regarding what motions to file or when to file them any more than it intends to do so for the defense counsel. In short, the court can only consider those motions which have been filed.

within 120 days after filing the complaint [see Doc.38 and 40]. The remaining defendants are: (1) Hydro-Vac Services, Inc. ("HVSI"); (2) Bill Foxworth ("Foxworth"), the president and chief executive officer of HVSI; (3) Guy Moose ("Moose"), the regional director of the Division of Solid Waste Management of the State of Tennessee; and (4) Golden Gallon, Inc.("Golden Gallon"), a customer of HVSI.

This action was commenced after plaintiff was fired by HVSI on August 27, 1990.[2] HVSI is in the business of treating and disposing of industrial waste waters and solids. It is only permitted to treat and dispose of non-hazardous waters and solids, although it is a permitted transporter of hazardous waste. Plaintiff was

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[2]Plaintiff has filed two other actions as a result of his being fired by HVSI. On September 24, 1990, plaintiff commenced an action before the United States Department of Labor claiming retaliatory, discriminatory discharge under various employee protection provisions of numerous federal environmental statutes. The first stage review by the Department of Labor resulted in a finding that there had been no retaliatory, discriminatory discharge by HVSI. Plaintiff then filed an appeal with the chief administrative law judge and was afforded a de novo hearing in January, 1991, which was heard over a two-day period. The record in that case is closed and a recommended decision and order from the administrative law judge was issued January 21,

hired on March 19, 1990 to be the lab director of HVSI. As such, plaintiff was responsible for setting up HVSI's new analytical laboratory to analyze waste in accordance with the rules, regulations and requirements of the United States Environmental Protection Agency, the Tennessee Department of Health and Environment, and the City of Chattanooga Waste Water Treatment Department. According to Foxworth, HVSI terminated plaintiff because he "was unable to establish the analytical laboratory in accordance with the appropriate rules and regulations, and, was a very disruptive employee." [*See* Doc. 13, p.2]. Plaintiff alleges that he was fired because the defendants conspired to prevent him from disclosing to the media, government, or anyone else HVSI's illegal dumping. It must be

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1992. [*See* Doc. 14, Exh.4]. The administrative law judge, Robert M. Glennon, found that HVSI "had legitimate and non-discriminatory reasons to discharge [plaintiff]...because he "performed poorly at his job...disrupted the organization." [*See id.*]

On August 26, 1991, plaintiff commenced an action against the same defendants in the Circuit Court of Tennessee, Eleventh Judicial District, at Chattanooga. The state claim contains two counts, which are identical to Counts II and III of this action. On January 28, 1992, motions to dismiss were heard by The Honorable Samuel H. Payne, who dismissed that action by order dated February 11, 1992 [*see* Doc. 54, Exh.3].

emphasized, however, that even though most of the allegations of Count III set forth a cause of action for retaliatory discharge by a conspiracy, plaintiff's subsequent filings clearly indicate that this lawsuit seeks no redress for retaliatory discharge [*see* Doc. 36, pp.12 and 18].

This matter is presently before the court on the following motions:

1. Moose's motion to dismiss [Doc.7];

2. Golden Gallon's motion to dismiss [Doc.9]; and

3. Foxworth's and HVSI's motion to dismiss, alternative motion for summary judgment, and motion for sanctions [Doc.12].

The issues raised have now been briefed by the parties [*see* Docs. 8,10,15,17,18,23,26,31,36, 39,44 and 53].[3] For the reasons that follow, these motions will be granted and this case dismissed.

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[3]Plaintiff was granted leave to file certain papers by order entered April 29, 1992 [*see* Doc.46]. Because these papers were personally delivered to the Clerk by plaintiff on April 10, 1992, the Clerk was reluctant to accept them since plaintiff had previously filed a pleading *pro se* even though he was represented by counsel in violation of Local Rule 83.4© [*see* Doc.16]. That pleading was

RCRA

Defendants move to dismiss Count I of the complaint brought pursuant to §6972 of the RCRA. Section 6972, the citizen suit provision of the RCRA, permits individuals to commence an action in district court to enforce waste disposal regulations promulgated under the Act. *See Hallstrom v. Tillamook County,* 493 U.S. 20, 22, 110 S.Ct. 304, 307, 107 L.Ed.2d 237 (1989).

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subsequently stricken in its entirety [*see* Doc. 34]. Nevertheless, the court allowed plaintiff to file these papers because the court presumed they would be exhibits to his brief [Doc. 26], which was filed by his attorney of record, Mark T. Light. However, a review of this 270-page filing and plaintiff's briefs indicates that there is no specific reference in *any* brief to any of the papers. For the most part, these papers appear to be incomplete excerpts of various files and records. As defense counsel correctly points out, all defendants and the court "are left with the near impossible task of trying to match bald assertions in a Brief to unsworn portions of incomplete Affidavits not submitted by Counsel." [*See* Doc. 53, p.5]. Without any assistance from plaintiff's counsel, the court does not intend to scour these disjointed records in order to salvage plaintiff's case. Thus this filing will not be considered in ruling on defendants' pending motions.

Specifically, §6972(a)(1) permits any person to commence a civil action against an alleged violator of regulations established under RCRA "[except] as provided in subsection (b)." Subsection (b)(1) states:

> (b) **Actions prohibited**
>
> No action may be commenced under paragraph (a)(1) of this section --
>
> (1) prior to sixty days after the plaintiff has given notice of the violation (A) to the Administrator [of the Environmental Protection Agency ("EPA"); (B) to the State in which the alleged violation occurs; and © to any alleged violator of such permit, standard, regulation, condition, requirement, or order. ...

42 U.S.C. §6972(b)(1)(1983 ed.). In discussing this particular prohibition, the *Hallstrom* Court observed as follows:

> The language of this provision could not be clearer. A citizen may not commence an action under RCRA until 60 days after the citizen has notified the EPA, the State in which the alleged violation occurred, and the alleged violator. Actions commenced prior to 60 days after notice are "prohibited." Because this language is expressly incorporated by reference into §6972(a), it acts as a specific limitation on a citizen's right to

> bring suit. Under a literal reading of the statute, compliance with the 60-day notice provision is a mandatory, not optional, condition precedent for suit.

493 U.S. at 26, 110 S.Ct. At 308-09.

In the instant case, defendants contend that plaintiff has not complied with this notice and 60-day delay requirement before commencing suit so that this count of the complaint must be dismissed. The court agrees. In fact, plaintiff admits in the complaint that the defendants are entitled to 60 days notice prior to filing this count of the complaint [*see* Doc. 1, ¶16]. Nevertheless, plaintiff also contends that the filing of the suit is intended to give defendants the 60 days notice [*see id.*, ¶18]. In the alternative, plaintiff alleges, "that in the event this Honorable Court finds this count premature, said count will be refiled sixty days after said order of said court." [*See id.*, ¶20].

The holding of *Hallstrom,* however, clearly divests this court of any discretion to consider Count I of the complaint as proper notice under the RCRA:

> Therefore, we hold that the notice and 60-day delay requirements are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision; a District Court may not disregard these requirements at its discretion.

493 U.S. at 31, 110 S.Ct. At 311. Thus, the Court concluded that because that action was barred by the terms of the statute, it must be dismissed. *Id.* It must be noted that the dismissal in *Hallstrom* occurred after years of litigation and a determination on the merits. Although the Court was "sympathetic" to plaintiff's argument that dismissal would "unnecessarily waste judicial resources", the Court observed that the statute itself put the plaintiffs on notice of the requirements for bringing suit. 493 U.S. at 32, 110 S.Ct. At 312. The Court further observed that its holding would "further the Congressional purpose of giving agencies and alleged violators a 60-day non-adversarial period to achieve compliance with RCRA regulations." *Id.*

Although *Hallstrom* mandates that the court dismiss this count of the complaint for plaintiff's failure to comply with the notice and 60-day delay requirement of the RCRA, *Hallstrom* avoided deciding whether this notice provision is jurisdictional or procedural. However, the Sixth Circuit has held that this notice provision is mandatory and jurisdictional and must be alleged in any complaint brought under the citizen suit provision. *Walls v. Waste Resource Corporation*, 761 F.2d 311, 316 (6th Cir. 1985). Furthermore, the Sixth Circuit, in analyzing a plaintiff's failure to comply with the notice requirement of the RCRA under circumstances remarkably similar to the instant case, held that the dismissal should be *with prejudice* and commented as follows:

> Plaintiffs were put on notice, by defendants' motions to dismiss, that defendants were asserting that plaintiffs had not sufficiently alleged response costs and that they had failed to allege compliance with RCRA's notice requirement. Yet plaintiffs made absolutely no effort to amend their complaints at any time during the period of more than a year that defendants' motions to dismiss were pending. In light of this circumstance, dismissal with prejudice was warranted.

McGregor v. Industrial Excess Landfill, Inc., 856 F.2d 39, 44 (6th Cir. 1988). In the case at hand, plaintiff was first put on notice on January 8, 1992 by defendant Moose that he had not complied with the notice and 60-day delay requirements of the RCRA [*see* Doc. 7]. All remaining defendants likewise incorporated this argument in their respective motions and briefs. Yet, plaintiff has made no motion to amend or to dismiss without prejudice. In fact, plaintiff continues to refuse to recognize the plain holdings of *Hallstrom, Walls, and McGregor*.[4] Plaintiff's obstinance shall be rewarded accordingly and this count of the complaint will be dismissed with prejudice.

Section 1983

Defendants next move to dismiss Count II of the complaint which alleges violations of

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[4]All of these cases were cited in defendants' briefs.

42 U.S.C. §1983. That portion of the complaint states as follows:

> 1. That Count II incorporates all other allegations set forth in the complaint by reference.
>
> 2. That Count II does not apply to governmental Defendants.
>
> 3. That said Defendants acting jointly and severally by and through their conspiracy and by and through their agents did knowingly and intentionally while acting under color of state law deprive said Plaintiff of his rights as protected under the laws of the Constitution of the United States of America.
>
> 4. That said breech [sic] of said duty did proximately cause said Plaintiff to suffer damages in excess of $10,000.00
>
> WHEREFORE, Plaintiff prays this Honorable Court to enter a judgement against said Defendant in the amount in excess of $10,000.00 (TEN THOUSAND DOLLARS) for actual and punitive damages together with interest, costs and attorney fees as provided by law.

[*See* Doc. 1, p.7]. Thus, Count II alleges that the nongovernmental defendants[5] engaged in a

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[5]According to plaintiff, the only original "governmental" defendants were the Metropolitan Area Transit Authority and the United States of America [*see* Doc. 18, p.5].

a conspiracy and acted under color of state law to deprive plaintiff of some unspecified rights guaranteed under the laws and Constitution of the United States of America. No defendant is specifically identified, no acts are specifically identified, no specific state law is identified, an no specific constitutionally-protected rights are identified. In the court's opinion, this count does not meet the mandates of Rule 8(a), Federal Rules of Civil Procedure, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief..." And should therefore be dismissed for this reason alone.

Furthermore, even a brief foray into Count III entitled "Pendant [sic] State Claim" in order to salvage plaintiff's §1983 claim is of limited benefit. Count III does set forth the objectives of the alleged conspiracy of the defendants: (1) "the actual physical dumping of hazardous and nonhazardous [sic] waste;" (2) "to [sic] silencing of state and federal investigators so that the illegal dumping would go undetected;" and (3) "to silence, intimidate, fire, harass, or otherwise silence employees of [HVSI] so that it would not disclose to the media, to the federal government, or to other parties the illegal dumping." [*See* Doc. 1, pp.9-10]. Plaintiff further alleges that all defendants "did cause said Plaintiff to be harassed, intimidated, and eventually fired." However, Count III, like Count II, does not specifically identify even one constitutional right which has been violated. Thus, even the combination of Counts

II and II falls short of satisfying the requirements of Rule 8(a).[6]

Assuming, *arguendo*, that plaintiff has satisfied the requirements of Rule 8(a), the court further finds that Count II should be dismissed under Rule 12(b)(6) because plaintiff has failed to state a claim for conspiracy under §1983 under the law in the Sixth Circuit. It is well settled that conspiracy claims must be pled with some degree of specificity and that vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim under §1983. *Gutierrez v. Lynch*, 826 F.2d 1534, 1538 (6th Cir. 1987). *See also Jaco v. Bloechle*, 739 F.2d 239, 245 (6th Cir. 1984) (conspiracy claim under §1985 properly dismissed where "complaint merely alleged broad conclusory negligence language void of the factual allegations necessary to support a conspiracy theory"). Applying this standard to the instant complaint, this court likewise concludes that plaintiff's conspiracy claims are "vague and conclusory" and fail to state a claim upon which relief can be granted.

Similarly, defendants' motions to dismiss this count can be granted for another reason.

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[6]Plaintiff's failure to satisfy Rule 8(a) is mot noticeable as to defendant Golden Gallon which is not mentioned by name anywhere in the complaint other than in the caption.

In order to state a claim under §1983, plaintiff must allege two elements: (1) the plaintiff must show a deprivation of rights secured by the "Constitution and laws" of the United States; and (2) plaintiff must show that the defendant deprived him of this federal right "under color of law." *Jones v. Duncan*, 840 F.2d 359, 361-62 (6th Cir. 1988). In the court's opinion, plaintiff has not properly pled the first element because he has yet to identify which constitutional rights or laws have been violated.

Finally, assuming, *arguendo*, that Count II should not be dismissed under either Rule 8(a) or Rule 12(b)(6), the court concludes that summary judgment must be entered in favor of all defendants as to this count because plaintiff has not demonstrated that the defendants deprived him of any federal right "under color of law," a necessary element of a §1983 action. This element insures the scope of §1983 will not encompass purely private conduct. *See Lemmons v. Tranbraw*, 425 F.Supp. 499, 498 (E.D. Tenn. 1976). In analyzing whether the allegations of the instant complaint satisfy the requisite second element, the principal inquiry in determining whether a private party's actions constitute "state action" under the Fourteenth Amendment is whether the party's actions may be "fairly attributable to the state." *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982)).

In the instant case, it is undisputed that three of the remaining defendants are purely private parties: HVSI, Foxworth, and Golden Gallon. Arguably, defendant Moose is a state actor because he is the Regional Director of the Division of Solid Waste Management for the Department of Environment and Conservation, State of Tennessee [*see* Doc. 25]. It therefore follows that if Moose is a state actor, then the complaint alleges "state action" by all defendants because of the alleged conspiracy among all defendants resulting in plaintiff's firing by HVSI. Nevertheless, even though the complaint properly pleads state action, this §1983 cause of action cannot survive defendants' motions for summary judgment for the reasons that follow:

Defendant Moose has filed an affidavit in support of his motion for summary judgment in which he testifies, *inter alia*, as follows:

. . .

> 2. That my first meeting with [plaintiff] was on July 3, 1990, when he and Mr. Bill Foxworth visited my office on Milne Street in Chattanooga, Tennessee, for the express purpose of discussing the special waste procedures used by [HVSI] and to introduce me to Mr. Oliver. There was no discussion at the meeting concerning any termination of Mr. Oliver as an employee of HVSI.
>
> 3. On August 23, 1990, Mr. Foxworth and Mr. Tom Cochran (both

> from HVSI) visited the Chattanooga field office on Milne Street to discuss a situation concerning Mr. Oliver and to introduce Mr. Cochran as the new Facility Manager. At that time I was informed that Mr. Oliver was being terminated as an employee of HVSI and that I might be contacted by Mr. Oliver with regard to alleged environmental wrongdoing on the part of HVSI. I made no comment to either Foxworth or Cochran concerning the foregoing information.
>
> . . .
>
> 15. At no time from July 3, 1990, until the present time, have I agreed to, attempted to, or conspired to have Mr. Oliver terminated with regard to employment or in any way thwart his efforts to have HVSI investigated by my Division. Quite the contrary, his unfounded allegations cost the State of Tennessee substantial expenditure of monies and man hours.

[*See* Doc. 25]. Moose's testimony also sets forth in detail various allegations made by plaintiff concerning environmental wrongdoing on the part of HVSI and, more importantly, sets forth his investigations of plaintiff's allegations. Moose concludes that all of Mr. Oliver's allegations were "groundless" [*see id.*, ¶9].

Likewise, in support of HVSI's and Foxworth's motion for summary judgment,

Foxworth has filed his affidavit in which he testifies, *inter alia*, as follows:

. . .

> 4. Mr. Oliver did not have a specific employment contract with HVSI. No employee of the company has a written contract. As with all my employees, I retain the right to terminate Mr. Oliver at any time.
>
> 5. Mr. Oliver's termination was effective August 27, 1990. There were a number of reasons for his termination which have been the subject of my testimony before the United States Department of Labor. Basically, during the course of his employment, Mr. Oliver was unable to establish the analytical laboratory in accordance with the appropriate rules and regulations, and, was a very disruptive employee.
>
> 6. I personally made the decision to terminate Mr. Oliver on August 22, 1990 following a confrontation between Mr. Oliver and Mr. Cochran. Mr. Cochran was then general manager of HVSI. I made this decision based on my observation of Mr. Oliver's performance of his job, and his history with the company. I consulted with no one except Tom Cochran prior to making this decision. I did discuss the decision with Mr. Guy Moose of the State Solid Waste Office after we had decided to terminate Mr. Oliver. The purpose of that discussion was only to inform Mr. Moose of the

> termination, and that we expected Mr. Oliver would be in contact with him about alleged environmental wrongdoing. We did not discuss any other aspect of Mr. Oliver's employment or of his allegations of environmental wrongdoing. The meeting was also to introduce Mr. Moose to Mr. Cochran, since they had not met, and I expected Mr. Cochran to be in close contact with Mr. Moose concerning our permit requirements.
>
> . . .

[*See* Doc. 13].

In response to all pending motions, plaintiff has filed his affidavit [Doc. 20] and the affidavits of two other employees of HVSI, Randal Blevins and Jerry Magness [*see* Docs. 19 and 21, respectively]. The court has carefully reviewed these affidavits and finds that they are totally unresponsive to the affidavits of Moose and Foxworth regarding the purported conspiracy to fire plaintiff and, in particular, are void of any allegations of "state action" by Moose or any other defendant to terminate plaintiff.

Pursuant to Rule 56, summary judgment shall be rendered when requested if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. It is the burden

of the party seeking summary judgment to show the court that, under uncontradicted facts, the moving party is entitled to judgment as a matter of law. Summary judgment is intended to provide a quick, inexpensive means of resolving issues as to which there is no dispute regarding the material facts. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In assessing the validity of a summary judgment motion, the court views the pleadings, depositions, answers to interrogatories, admissions, and competent affidavits in a light most favorable to the opponent of the motion. However, an opponent to a motion for summary judgment may not rest upon the mere allegations or denials of his pleadings, but must set forth through competent and material evidence specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.* at 247-48. Applying this standard to the facts of the instant case as they have been developed, summary judgment must be entered in favor of all remaining defendants as to Count II of the complaint because the court concludes as a matter of law, that there was no state action involved in plaintiff's termination by HVSI.

Pendent State Claims

Where a district court exercises jurisdiction over state law claims solely by virtue of pendent jurisdiction and the federal claims are dismissed prior to trial, the state law claims should ordinarily be dismissed without reaching their merits. *Wolotsky*, 960 F.2d at 1338 (citations omitted). Because both of plaintiff's federal claims have been dismissed, the court will therefore dismiss plaintiff's pendent state claims (in their present nebulous form) in Count III without prejudice.

Sanctions

All remaining defendants have moved the court to impose sanctions on plaintiff and/or his counsel for filing this complaint. It is beyond dispute that plaintiff prematurely filed Count I of his complaint and, after an appropriate hearing, sanctions will be imposed pursuant to Rule 11, Federal Rules of Civil Procedure, in an amount to be determined. The court will, of course, consider the factors enunciated in *Jackson v. Law Firm*, 875 F.2d 1224, 1229-30 (6th Cir. 1989). *See also Danvers v. Danvers*, 959 F.2d 61 (6th Cir. 1992). Similarly, sanctions may be appropriate with regard to Count II of the complaint. Again, this will be determined after an appropriate hearing. At that time, the court will also consider whether fees should be imposed against plaintiff's counsel pursuant to

28 U.S.C. §1927 because of the filing of non-responsive briefs and affidavits. Finally, the court will consider whether sanctions should be imposed upon plaintiff or plaintiff's counsel or both.

Order accordingly.

"s/_____"

James H. Jarvis
UNITED STATES DISTRICT JUDGE

AFFIDAVIT OF RANDALL BLEVINS

STATE OF TENNESSEE)
) ss:
COUNTY OF HAMILTON)

NOW COMES the undersigned, RANDALL BLEVINS, and being first duly sworn, deposes and says:

1. That I was employed by Hydro-Vac Services, Inc. ("Hydro-Vac") in Chattanooga, Tennessee, from the time Hydro-Vac first started in 1988 until November of 1990.

2. That during my employment at Hydro-Vac, I observed or was involved in the following circumstances/events:

3. All Roto-Rooter discharges that came into Hydro-Vac were dumped into the City of Chattanooga sewer system, either by-passing the monitor or through some other entry into the sewer system where no record of the dumping would take place. Mainly, the Roto-Rooter discharges took place behind the drum building in a hole next to the back pit. Roto-Rooter pumpings that came from the State of Georgia also were dumped in this manner. Persons whom I know who have discharged Roto-Rooter sewage in this manner are:

a. Myself (Randall Blevins)
b. David Wilson
c. Jim Everton

4. There were times when Hydro-Vac was dumping at the 23rd Street Dump in Chattanooga, before Hydro-Vac's waste treatment business began, that I was asked to drive an empty pump truck to the 23rd Street Dump and appear to dump the truck for the purpose of getting a record. I was told to do this by Mr. Ray Dunn.

5. I was asked to comingle latex, gasoline dirt, and black waste oil together and have observed Don McGee Jr. haul this mixture away from Hydro-Vac. It was my understanding that he was taking this mixture to the Summit Landfill in Chattanooga.

6. I was laid off from Hydro-Vac in November of 1990 and the oil processing plant which was being built was not completed at that time. Hydro-Vac had a large volume of oil coming into the plant and had no way to process it; therefore, I was told to comingle the oil with latex and gasoline-contaminated dirt.

7. All of the gasoline-contaminated dirt which was brought in from the original Golden Gallon delivery of 192 yards, that Ernest A. Oliver was so upset about, was comingled with latex and oil and then taken to the Summit Landfill.

8. The dirt that was stored in the red roll-off boxes after Ernest A. Oliver's firing came from the back of Hydro-Vac where a large oil spill had occurred. A large tank was being brought into the plant for storage and, as the tank was taken off the transport vehicle, a large amount of oil spilled out of the tank

onto the ground. Andy Hall ordered this oil to be buried and the oil was buried at the spill site by Don McGee Jr. Later, it was dug up and placed into the red roll-off boxes.

9. All liquid wastes that came into Hydro-Vac were dumped together into the large concrete pits next to the weir pit. From there, they would be pumped into holding tanks. No liquid latex or liquid chemical waste was processed separately.

10. All drum wastes that came into Hydro-Vac were poured together into the back pit and mixed with whatever was back there, including oil and gasoline-contaminated dirt, and hauled by Don McGee Jr. to the Summit Landfill.

11. While I was employed at Hydro-Vac, it is my belief, based on actual on-site experience, that no more than twenty percent (20%) of all liquid waste which came into Hydro-Vac was treated before it was discharged into the Chattanooga sewer system. It is also my belief that eighty percent (80%) of all liquid waste was placed into the Chattanooga sewer system in a manner that by-passed the monitoring system.

12. When a tanker truck containing liquid waste came into Hydro-Vac, it would be dumped into one of the concrete pits next to the weir, and a sample taken to the lab during the dumping. At no time to my knowledge was a sample processed by the laboratory before the truck was dumped. Also, in the case of drums,

random samples would be taken after the drums were dumped into the back pit. The process of checking a sample to see if it fit a profile, before the waste was dumped and comingled with other waste, did not occur.

13. Often, liquid samples taken from a large batch of treated water that was being sent past the monitor would be brought into the lab after the water had already been discharged.

14. I have been told by Mr. Ray Dunn to back a tanker up to the ditch which runs into the Chattanooga Creek, and have observed him allowing the untreated liquid waste to run into the ditch and into the Chattanooga Creek. Two (2) companies whose waste was handled in this manner were Diversified Products of Opelika, Alabama and Textile Rubber Company of Dalton, Georgia.

15. There were a lot of instances where a tanker came into Hydro-Vac and was dumped into the Chattanooga Creek, but I cannot remember the name of the company the waste came from. There were times when the tanks in the back were full and we would just start them siphoning and they would run into the ditch and then into the Chattanooga Creek. Since we comingled all liquid wastes together, I cannot state the names of which companies whose wastes were represented by these discharges into the Chattanooga Creek.

16. From my experience, none of the waste that came from Diversified Products of

Opelika, Alabama ever went into the Chattanooga sewer system. All of this waste was stored in the back and dumped into the Chattanooga Creek.

17. Don McGee Sr. was the truck driver who hauled most, if not all, of the Diversified Products waste. There have been times when Don McGee Sr. had returned from Diversified Products in Opelika, Alabama with an empty truck.

18. I have been told by Hydro-Vac's management, including Bill Foxworth, Ray Dunn, Tom Cochran, and Eric Miller to let untreated waste water run into the Chattanooga sewer system, by-passing the monitor. There were also times when we pumped it to the back of the drum building, and even pumped it into the toilet in the drum building on top of the hill. Any hole which was available that we could get a hose into would be used.

19. We tried to treat what waste water we could, but it was coming in so fast and once all of the holding tanks were full, we were told to "let it go."

20. There was a lot of waste water which was brought into Hydro-Vac from a landfill run-off outside of Nashville, Tennessee. It was dirty water that was not checked by the lab and was mixed with other liquid wastes and went down the Chattanooga sewer system, by-passing the monitor.

21. A lot of times these discharges happened after hours with the owner of Hydro-

Vac, Bill Foxworth, inside watching from his office window. I have been told by Bill Foxworth to let untreated waste water run, by-passing the monitor into the Chattanooga sewer system. I have been told by Bill Foxworth to dump Roto-Rooter sewage waste into a hole leading into the Chattanooga sewer system, located behind the drum building.

22. All the waste water which was being held by Hydro-Vac in the two large clarifiers from Peachtree in Atlanta, Georgia was dumped into the Chattanooga sewer system, by-passing the monitor.

Further, Affiant saith not.

"s/_____"
Randall Blevins

STATE OF TENNESSEE)
COUNTY OF HAMILTON) ss:

On this 11th day of September, 1991, before me, Vera Hutson _____, of the state and county aforesaid, personally appeared RANDALL BLEVINS, the within named Affiant, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence), and who, upon oath, acknowledged that he executed the foregoing Affidavit and that the statements

contained therein are true to the best of his knowledge and belief.

"s/_____"
Vera Hutson
Notary Public

My commission expires:
January 6, 1993 (S E A L)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT AT CINCINNATI

ERNEST A. OLIVER,	*	CIVIL ACTION
	*	CASE NO. 97-5354
Plaintiff- Appellant	*	
	*	
v.	*	
	*	
HYDRO-VAC SERVICES, INC.;	*	
GOLDEN GALLON, INC.;	*	
GUY MOOSE; BILL FOXWORTH;	*	
ALC INCORPORATED, et al.,	*	
	*	
Defendants - Appellees.	*	

PRO SE APPELLANTS'S BRIEF

Appealing the January 31, 1997 Order of
Judge James H. Jarvis
In the United States District Court
for the Eastern District
of Tennessee at Chattanooga
Case No. 1:91-cv-354

ORAL ARGUMENT REQUESTED

Dated: June 11, 1997

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GUY MOOSE; BILL FOXWORTH;	*	
ALC INCORPORATED, et al.,	*	
	*	
Defendants - Appellees.	*	

BRIEF OF PLAINTIFF/APPELLANT/PRO SE
ERNEST A. OLIVER

ORAL ARGUMENT REQUESTED

STATEMENT OF ISSUES PRESENTED

I. Did the District Court incorrectly decide the facts?

II. Do you think the District Court applied the wrong law?

III. Do you feel that there are others reasons why the District Court's judgement was wrong?

IV. What action do you want the Court to take in this case?

V. What specific issues do you wish to raise on appeal?

VI. The challenge of Judge Jarvis and Defendants/Appellees as to the timeliness of Plaintiff/Appellant's Appeal.

STATEMENT OF THE CASE

This action was commenced by the Plaintiff/Appellant in August of 1991 against the Appellees and approximately (80) other Defendants, charging that Defendants engaged in an illegal hazardous waste dumping operation in the City of Chattanooga and a conspiracy to wrongfully terminate Plaintiff/Appellant from his employment with Defendant/Appellee Hydro-Vac Services, Inc., and to deprive him of constitutionally protected rights, in violation of 42 U.S.C. § 1983 & 1985. When the investigation of Plaintiff/Appellant's allegations revealed that Defendant/Appellee Hydro-Vac Services, Inc. and its owner William Foxworth had been illegally commingling the wastes of over 80 companies and had contaminated the unlined Chattanooga Summit Landfill with at least 13 hazardous wastes in huge amounts, the conspiracy to cover-up the problem began. Foxworth had been operating Hydro-Vac Services, Inc. for over 18 months in direct violation of orders from the Air Pollution Board, and in direct violation of

regulations of the City of Chattanooga, and the State and Federal environmental protection agencies, when the violations were discovered.

Defendant/Appellee, State Solid Waste Manager Guy M. Moose, conspired with attorneys William Colvin, Frederick Hitchcock, and James W. Gentry representing the Appellees herein, to cover-up the facts in this case and to defraud the Courts and the American Public as to the damage to the Landfill and the threat to the health and welfare of the general public.

When the case came before State Circuit Court Judge Samuel H. Payne, Plaintiff/Appellant tape recorded a conversation with Judge Payne in order to prove the overwhelming conspiracy and abuse of the justice system in Tennessee. This tape recording and transcript has been placed before this Honorable Court in Plaintiff/Appellant's Petition For Writ Of Prohibition, Court of Appeals Case No. 97-5611. Judge Payne states he's not concerned about the hazardous waste dumping operation going on in his own district, and that he and other Judges in Chattanooga are not public protectors.

When the case came before Federal District Judge James H. Jarvis and revelations of the political damage and the embarrassment that could occur to over 80 companies, Judge Jarvis joined the conspiracy as well. Judge Jarvis did not foresee that his protection of the dumping would have the potential to destroy the wholesome image of North America's largest private snack food company, Mckee Foods

Corporation, manufacturers of Little Debbie® products, whose baking plants are located adjacent to the Landfill.

Judge Jarvis not only threw out the case rendering an opinion based on fraud, but he issued an injunction against Plaintiff/Appellant preventing him from ever refiling the case even though the dumping operation is still going on. The conspiracy has continued from 1990 through the present time and has resulted not only in the loss of Plaintiff/Appellant's chemistry teaching position at Chattanooga State Technical Community College (herein "CSTCC"), but also in slander and libel against Plaintiff/Appellant's scientific abilities and expertise. A right to sue letter was issued by the EEOC against CSTCC on May 2, 1996 resulting in the Plaintiff/Appellant's Federal lawsuit at Case No. 1:96-Cv-380 currently before the Honorable Thomas G. Hull. Judge Hull dismissed Plaintiff/Appellant's Count II alleging conspiracy between CSTCC, Defendant/Appellees and their attorneys, and others, for conspiracy to violate Plaintiff/Appellant's civil rights. Judge Hull stated Plaintiff/Appellant's Count II was a collateral attack on Judge Jarvis's previous order enjoining Plaintiff/Appellant from:

> "... filing any further pleadings in this case and any further pleadings in the United States District Court for the Eastern District of Tennessee arising out of the facts set forth in this lawsuit..."

However, Honorable Thomas G. Hull also made the following statement in his order of December 18, 1996 with respect to the case before Judge Jarvis:

> "... there is a suggestion in the record that Judge Jarvis may have relied upon a false affidavit in dismissing the previous lawsuit..."

Plaintiff/Appellant then filed a Motion to Set Aside Orders on January 17, 1997 in the immediate case which was denied by Judge Jarvis by his Final Order of January 31, 1997. This Final Order was appealed by Plaintiff/Appellant within 10 days under Rule 60, Federal Rules of Civil Procedure and Rule 4, Federal Rules of Appellate Procedure.

On May 19, 1997, Plaintiff/Appellant filed a Petition For Writ Of Prohibition against Judge Jarvis which is presently before this Honorable Court as Court of Appeals Case No. 97-5611. Judge Jarvis was given the opportunity by this Honorable Court to respond to the charges in said petition. On Friday, June 6, 1997, Plaintiff/Appellant was informed by the Clerk of the Court that Judge Jarvis had returned the certified docket as requested by this Court but had submitted no cover letter and no response.

STATEMENT OF THE FACTS

On **August 27, 1990**, Plaintiff/Appellant Ernest A. Oliver ("Oliver") was fired from his position of Lab Director at Hydro-Vac Services,

Inc., a Chattanooga, Tennessee based nonhazardous waste water treatment facility ("Hydro-Vac"). Oliver was fired for blowing the whistle on illegal activities regarding the improper disposal of both hazardous and nonhazardous wastes. Oliver requested an investigation by the U.S. Department of Labor which resulted in a hearing before ALJ Honorable Ralph Musgrove on **January 22 and January 23, 1991**. Following Oliver's appeal of replacement ALJ's decision, on **November 1, 1995**, U.S. Secretary of Labor, Dr. Robert Riech, ordered Hydro-Vac to reinstate Oliver stating Hydro-Vac had illegally fired Oliver from his lab director position. On **February 19, 1997**, Honorable Daniel A. Sarno, Jr. ordered Hydro-Vac to pay Oliver $43,000.00 in back pay and front pay plus interest for illegally firing Oliver.

During Oliver's employment at Hydro-Vac and after his termination, he gathered significant evidence in the form of documents, pictures, tape recordings, and video tape to prove not only his allegations of illegal disposal of hazardous wastes, but moreover, that a conspiracy which began in 1990 is still continuing, and has today become so large as to infect the Tennessee State and Federal Court systems, the FBI, the Department of Justice and Offices of U.S. Attorney General Janet Reno, Vice-President Albert Gore, Jr., and the Clinton Administration.

Defendant/Appellee, Guy M. Moose ("Moose"), is Director of the Southeast

Regional Office, Division of Solid Waste Management for the State of Tennessee, located in Chattanooga. During the period of **August 1990 through January 1991**, Moose and his office investigated Oliver's allegations of illegal dumping of hazardous wastes by Hydro-Vac and found that Hydro-Vac had violated the Tennessee Hazardous Waste Management Act and the Tennessee Solid Waste Management Act. (See Exhibits 9 & 10, Docket 70). Moose cited Hydro-Vac on at least three (3) different occasions, which included allowing wastes containing 40 C.F.R Subpart C hazardous wastes to migrate into the Chattanooga Creek. Moose withheld all of this information from Oliver at the labor hearing before ALJ Musgrove and he testified under oath at the Federal Labor Hearing on **January 23, 1991** that no hazardous wastes were present at Hydro-Vac.

Attorney Frederick L. Hitchcock ("Hitchcock"), who represented Golden Gallon, Inc. in the immediate case, had provided clear proof to Judge Jarvis in his affidavit of September 23, 1992 at docket #76, that Hitchcock was fully aware that his client Golden Gallon's gasoline contaminated dirt had become hazardous by Federal standards, as more specifically defined in City of New York v Exxon Corp., 766 F.Supp. 177 (S.D.N.Y. 1991). Hitchcock admits at paragraph 3(c) of his affidavit that:

> "...the petroleum-Contaminated Soil was mixed with some waste other than petroleum from an underground storage tank installation..."

Hitchcock also admits at paragraph 3(b) that:

> "Contaminated soil from underground storage tank installations and other materials such as absorbent pads used to clean up petroleum spills are not subject to regulation as hazardous waste, even though the petroleum in the soil or other materials contains chemical substances, such as benzene and toluene, that would separately subject to regulation as hazardous waste. 40 C.F.R. 261.4(b)(10) and TDEC Rules 1200-1-11.02(1)(d)(vii) (Copies attached as Exhibit 1.)".

Hitchcock further states that he hired a geologic and environmental consulting firm to examine the petroleum-contaminated soil, and that it was determined that other constituents were present other than contamination from petroleum underground storage tanks. Hitchcock states that the Golden Gallon contaminated soil was then placed in "roll-off boxes" on Hydro-Vac's premises and that he had shared the information from the consulting firm with the Tennessee Department of Environment an Conservation (i.e., Moose).

It is a fact that the City of Chattanooga has identified hazardous wastes benzene and dichloroethylene- and three metals- mercury, cadmium and barium in monitoring wells at the Summit Landfill.

It is a fact that Moose and the Tennessee Department of Environment and Conservation

identified benzene, mercury, cadmium, and barium at Hydro-Vac in wastes being prepared to be landfilled at the Summit Landfill.

It is a fact that on **September 21, 1990**, Jim Templeton with the City of Chattanooga Summit Landfill, advised Hydro-Vac that it would no longer accept any waste unless specifically authorized by the Division of Solid Waste Management in writing. This information in an inter-office memo of Moose, was also withheld by Moose from Oliver at the Federal Labor hearing held before ALJ Musgrove on **January 23-24, 1991**.

It is a fact that Mr. Rick Brown, Solid Waste Manager for the Tennessee Department of Environment and Conservation in Knoxville, in his letter to Hydro-Vac general manager Tom Cochran on **March 6, 1991**, admonishes Hydro-Vac for receiving hazardous wastes on at least two (2) occasions and states:

> "...your facility is not authorized to receive and treat hazardous wastes generated by others..."

This letter is part of the Record On Appeal and can be found at Exhibit #11, Docket #70.

ARGUMENT

I. Did the District Court incorrectly decide the facts?

a) It is a fact that Judge Jarvis issued a fraudulent **Memorandum Opinion** on

August 10, 1992 stating on page 13 that: "...Moose concludes that **all** of Mr. Oliver's allegations were "groundless"..."(emphasis added). No where in the record of this case is there any evidence whatsoever to even remotely support such a statement. In order for Judge Jarvis to be able to support his injunction preventing Plaintiff/Appellant from refiling his lawsuit, Judge Jarvis had to create a myth which would suggest that Plaintiff/Appellant was absolutely wrong in his actions of filing a citizen's suit against 82 companies. Judge Jarvis had to show that not even one allegation made by Plaintiff/Appellant was true. To do so, Judge Jarvis had to enter into a conspiracy with defense Attorneys William Colvin, Frederick Hitchcock, James Gentry, and State Solid Waste Manager Guy Moose, to ignore the overwhelming facts and documents signed by Moose and his office, which Plaintiff/Appellant submitted as evidence. All four (4) men and Judge Jarvis were fully aware that Judge Jarvis's statement: "...Moose concludes that **all** of Mr. Oliver's allegations were "groundless"..." (emphasis added) was and is **A BLATANT MISSTATEMENT OF THE TRUTH !**

b) It is a fact that Judge Jarvis only allowed sanctions against Plaintiff/Appellant for Count I and he specifically states these orders at page 3, lines 2 and 3 of the transcript located at Docket #100. It is a fact that Plaintiff/Appellant's attorney, Bob Bradshaw, specifically points out at page 70, lines 13 and 20, that Moose was not part of

Count I and should not be entitled to receive sanctions. Judge Jarvis states at line 23, " They say they weren't involved in that Count", however, Judge Jarvis awarded sanctions to Moose anyway. **ISN'T THIS RECEIVING MONIES UNDER FALSE PRETENSES AND MAIL FRAUD**?

II. Do you think the District Court applied the wrong law?

Judge Jarvis incorrectly applied Hallstrom v. Tillamook County, 493 U.S. 20,22,110 S.Ct. 304, 307, 107 L.Ed.2d 237 (1989), as the standard by which he bases his opinion, and his justification for sanctions and dismissal of Plaintiff's case. Plaintiff/Appellant submits that Hallstrom specifically indicates it does not apply under 42 U.S.C. 6972(b)(1)(A)(iii) when "subchapter III violations" (i.e. RCRA Subpart C violations) are occurring. In Dague v. City of Burlington, 935 F.2d 1343 (2d Cir. 1991), and in Martin v. Kansas Board of Regents, 32 Env't Rep. Cas. (BNA) 1944 (D. Kan. Feb. 19, 1991), the courts held that no 60- day notice was necessary when "RCRA Subpart C violations" have occurred.

At pages 12 and 13 of Judge Jarvis's Memorandum Opinion at Docket #56, Judge Jarvis shows that he is not only capable of outright lying in his opinion, but is also capable of ignoring the most important part of Guy Moose's affidavit found at Court Docket #25, in regard to Plaintiff's rights. Judge Jarvis quotes paragraphs 2 , 3, and 15 of Moose's affidavit to support his outrageous statement that:

> "...Moose concludes that **all** of Mr. Oliver's allegations were "groundless"..."(emphasis added)

Not only did Moose say nothing of the kind, but Judge Jarvis conveniently leaves out paragraph 14 of Moose's affidavit where Moose admits to citing Hydro-Vac for:

> "...The relief sought by Mr. Oliver in his prayer under Count I was, in fact, invoked by me and the State of Tennessee through a "permit by rule" procedure in the Fall of 1990, without any request from Mr. Oliver for such an action and not because Mr. Oliver had been discharged by HVSI at an earlier time..."

Here Moose is referring to his citing of Hydro-Vac on **January 22, 1991** for allowing oil from UST contaminated soil to migrate into the Chattanooga Creek. This citation is part of the **Record Of Appeal** and can be found as Exhibit #9 at docket #70. Judge Jarvis ignores the fact this oil migrating into the Chattanooga Creek from gasoline-contaminated dirt (UST Soil), contained "RCRA Subpart C" hazardous wastes benzine and toluene. The fact that these compounds are listed as hazardous wastes is further confirmed by Golden Gallon's attorney Hitchcock in his affidavit of September 23, 1992 at docket #76, previously introduced above under **STATEMENT OF FACTS**.

Therefore, because "RCRA Subpart C violations" were occurring at Hydro-Vac, Hallstrom v. Tillamook County cited by Judge

Jarvis does not apply. The correct law should have been the standard cases Dague v. City of Burlington Supra, and Martin v. Kansas Board of Regents Supra, where the courts held that no 60-day notice was necessary when "RCRA Subpart C violations" had occurred.

ANYONE WITH ANY COMMON SENSE AT ALL WOULD REALIZE THAT ALLOWING THE NAVIGABLE WATERS AND THE GROUNDWATER OF A CITY LIKE CHATTANOOGA TO BE POLLUTED WITH THE CANCER-CAUSING HAZARDOUS WASTES BENZINE AND MERCURY FOR 60 DAYS BEFORE ANY ACTION COULD BE TAKEN, WOULD BE CRIMINAL!

Plaintiff/Appellant specifically brought this to the attention of Judge Jarvis on September 16, 1992 at Docket #70. Judge Jarvis confirms that he is aware of this information when he states in his Memorandum Opinion of December 28, 1992 at Docket #98 on doc. Nos. 70 and 83 that:

> "...However, apparently unwilling to acknowledge this fact, plaintiff, proceeding pro se, has continued to file pleadings arguing that Count I is meritorious and that, therefore, the complaint was not frivolous and should not have been dismissed [see Docs.No. 70 and 83]."

On September 16, 1992 at Docket #70, Oliver filed his Motion to Deny Defendant's Motion For Sanctions with exhibits 1-17. Exhibit #9 is the Notice of Violation under the Solid Waste Management Act filed by Moose which charges Hydro-Vac with allowing oil from UST

contaminated soil (roll-off boxes) to migrate into the Chattanooga Creek. Exhibit #10 is the Notice of Violation under the Tennessee Hazardous Waste Management Act which was filed against Hydro-Vac by Moose's office on December 5, 1991 and charges Hydro-Vac with processing wastes that are hazardous for "Ignitability". Both of the above cited violations were for compounds that were hazardous for the characteristic of "ignitability".

In City of New York v Exxon Corp., 766 F.Supp. 177 (S.D.N.Y. 1991) at page 184, the Court establishes that under the RCRA regulations two(2) separate and independent standards exist for determining whether a substance is a hazardous waste. Subpart C of RCRA regulations provides that a waste is hazardous if it exhibits any of the characteristics of ignitability, corrosivity, reactivity, or EP toxicity. (See 40 C.F.R.§§ 261.20-261.24). Subpart D, on the other hand, is a list of both specific wastes and general waste categories which are considered RCRA hazardous wastes. (See 40 C.F.R. §§ 261.30-261.33). Under CERCLA'S definition of "hazardous substance", a hazardous substance includes any waste which falls under any of the various definitions and listings of hazardous wastes under other statues including RCRA and CWA. 42 U.S.C. § 9601(14).

In City of New York v Exxon Corp., 766 F.Supp. 177 (S.D.N.Y. 1991) it is absolutely clear that CERCLA liability is established in a multigenerator, multihazardous substance case, such as the immediate case, if the

Plaintiff can establish that the defendant (1) disposed of its hazardous substances, (2) at a facility which now contains hazardous substances of the sort disposed of by the generator, (3) if there is a release of that or some other type of hazardous substance, (4) which causes the incurrence of response costs.

Plaintiff/Appellant submits that there is absolute proof that Hydro-Vac received and commingled gasoline-contaminated soil with hazardous "used oil" and also "waste oil" along with wastes from over 80 companies. This waste was landfilled in the Chattanooga Summit Landfill over a period of 18 months until Plaintiff/Appellant blew the whistle in August of 1990.

The fact that Moose cited Hydro-Vac for having allowed this waste in "roll-off" boxes to migrate into the Chattanooga Creek is a second "RELEASE" in addition to the first "RELEASE" into the Chattanooga Summit Landfill. The fact that the City of Chattanooga has identified the same hazardous wastes in wells located at the Summit Landfill as these hazardous wastes that Moose and the Department Of Environment and Conservation had identified at Hydro-Vac during their inspections of Hydro-Vac in 1990, satisfies all the requirements under CERCLA to require all 82 companies listed in Plaintiff/Appellants complaint in the immediate case to clean up the Landfill.

The Affidavit of Hydro-Vac employee, Randall Blevins, found at Exhibit 12, Docket #70, establishes the mixing of different

wastes, and the landfilling of said wastes at the Summit Landfill. Also, Mr. Blevins establishes just how outrageous and illegal the operation was at Hydro-Vac.

III. Do you feel that there are others reasons why the District Court's judgement was wrong?

The answer to this question is a resounding yes. The reasons and the methods used to cover-up the illegal activities will be set forth here. When Judge Jarvis saw the STATEMENT OF FACTS at Docket #49 filed by Oliver, along with the brief filed by Oliver's attorney Mark Light (which was ordered accepted by Judge Jarvis at Docket #46), Judge Jarvis suddenly had a major problem. Judge Jarvis had no intention whatsoever of allowing 82 companies, including Georgia Pacific, Goodyear Tire & Rubber Company, Shaw Industries, Valvoline, Westinghouse, Penske Truck Leasing, Amana Refrigeration, and the United States Army at Fort Lee, Virginia, to be required to clean-up the contamination of the unlined Chattanooga Summit Landfill.

Judge Jarvis arbitrarily decided that he would throw out the laws established by the U.S. Congress and the Environmental Protection Agency and signed into law by several Presidents. Judge Jarvis decided that in this case, **HE** would be the law of the land.

In order to accomplish his plan to throw out and bury this case, Judge Jarvis had to threaten and intimidate Plaintiff/Appellant's

Michigan attorney, Mark Light into an agreement to abandon his client and to refuse to appeal Jarvis's ruling. Throughout the 30-day time for filing an appeal, Judge Jarvis maintained pressure against any appeal by a rather unique and equally outrageous scam which is part of the record, which cannot be defended, and should serve to provide grounds for the disbarment of **Knoxville Attorney John E. Owings**.

It was suggested that for the upcoming sanctions hearing, Attorney Mark Light hire a second lawyer to represent him other than his primary attorney, Tricia Dennis. Mr. Light needed a lawyer from Knoxville who had very special qualifications--Knoxville Attorney John E. Owings was a regular golfing partner of Judge Jarvis.

Shortly after hiring Owings, Attorney Light requested a postponement of the sanctions hearing that was set for August 26, 1992. On August 21, 1992 at Docket #57, Light asks for and was granted his request. Judge Jarvis then sets the sanction hearing for September 22, 1992, which is well past the time for an appeal of his final order of the case.

Plaintiff/Appellant Oliver then demanded that his attorney, Light appeal the outrageous order of Judge Jarvis stating: "...Moose concludes that **all** of Mr. Oliver's allegations were "groundless"..."(emphasis added)

Here Light refused, and stated that his lawyer, John Owings in Knoxville, who plays golf with Judge Jarvis regularly, has told him (Light), that if we appeal, the Judge is going to assess sanctions of $100,00.00 against Oliver and $200.000.00 against Light.

Shortly afterward, Light withdrew his representation and abandoned his client, Oliver, forcing Oliver to represent himself Pro Se. Judge Jarvis approved this request for Light to withdraw at Docket #78, without any word whatsoever to Oliver.

On September 14, 1992 at District Court in Winchester, Tennessee, (see Docket #59) , an attempt to obtain a temporary restraining order from Judge Jarvis, was devised by defense attorneys William Colvin and Frederick Hitchcock. The object was to gag Plaintiff/Appellant Oliver who was about to reveal that a fraudulent bank loan was in the process of being made to Hydro-Vac backed by the U.S. Small Business Administration.
Shortly before this hearing, Oliver was approached by Attorney John E. Owings who was now representing Mark Light. Attorney Owings assured Oliver that he (Owings) was close to Judge Jarvis, and that he was going to see that this sanction thing did not get out of hand. It was emphasized to Oliver by both Attorney Owings and Attorney Light that no appeal should be taken or Judge Jarvis would impose heavy sanctions. At the conclusion of the hearing, Judge Jarvis stated from the bench (the record was closed) "Mr. Owings, I want to see you in chambers."

On November 30, 1992 Chattanooga Attorney, Bob Bradshaw, contracted on a contingency basis to represent Plaintiff/Appellant Oliver in the scheduled December 16, 1992 sanctions hearing before Judge Jarvis, and also to sue Attorney Mark Light for malpractice. Attorney Bradshaw had absolute proof that the sanctions which had been imposed by Jarvis and awarded to Moose were not warranted. (See page 70, lines 13 and 20, of the transcript at Docket #100, which shows that Moose was not part of Count I and should not receive sanctions.) At page 70, line 23, of the transcript at Docket #100 Judge Jarvis states to attorney James W. Gentry representing Moose, " They say they weren't involved in that count." Jarvis awarded sanctions to Moose anyway.

Judge Jarvis so intimidated Attorney Bradshaw, a young attorney, who had requested to represent Oliver pro hac vice (See Docket #89), that Attorney Bradshaw breached and withdrew his contracted representation of Oliver, refused to appeal the order awarding sanctions, and described in his letter of January 29, 1993, to Oliver that: "...if he did appeal under Rule 60(b), that the only logical result would be the levying of further sanctions against both of us."

Judge Jarvis has exceeded his authority and had ignored the laws established by the Congress and the Environmental Protection Agency. Judge Jarvis has joined a conspiracy with the defense attorneys (and others) to obstruct and debase the administration of justice and to protect organized crime.

Judge Jarvis's actions against the health and welfare of the general public and his willing violation of the constitutional rights of Plaintiff/Appellant are absolutely proven herein.

Plaintiff/Appellant submits the facts herein are more than sufficient to support the definition of "High Crimes and Misdemeanors" necessary for the process of Impeachment of Judge Jarvis in the Congress of the United States of America.

IV. What action do you want the Court to take in this case?

a) I respectfully request this Honorable Court to set aside the Orders of Judge James H. Jarvis in Case No. 1:91-cv-354, and allow Plaintiff/Appellant to proceed with his constitutional rights to protect his home and city from the environmental disaster that has occurred due to the criminal actions of Judge Jarvis and the other conspirators in this matter.

b) I request the this Honorable Court order my Count II presently dismissed by Honorable Judge Thomas G. Hull in my Federal Lawsuit against CSTCC, Case No. 1:96-cv-380, be reinstated against all defendants who have violated my constitutional rights under color of law, 42 U.S.C. 1983 and 1985(3).

c) I request this Honorable Court order that a proper investigation be conducted into

the criminal activities of all persons involved in this matter.

V. What specific issues do you wish to raise on appeal?

a) Plaintiff/Appellant wishes to bring to the attention that according to the authority of the Annotation of the American Law Review, 97 A.L.R. 137, all matters in this case that could be challenged as untimely due to the Statue Of Limitations, should be tolled due to the continuing conspiracy that began in 1990 and is still continuing today.

There is documented facts and other evidence including tape recordings of numerous conspirators to prove that the conspiracy began by Defendant Solid Waste Manager Guy Moose and Defendant Tennessee Department of Environment and Conservation in January of 1991, was continued by Federal Judge James H. Jarvis and State Circuit Court Judge Samuel H. Payne and Defendant William H. Colvin, Defendant Frederick L. Hitchcock and Defendant James W. Gentry in August of 1992 and also members of the City Department of Public Works, was continued by Defendant Mayor Gene Roberts and members of the Chattanooga City Police Department in 1993 and 1994, was continued by Defendant Moose and Defendant State of Tennessee Department of Environment and Conservation in 1995, and is presently continuing by the actions of the Defendant Hamilton County Grand Jury Foreman Marsha Crabtree, Defendant Assistant Hamilton County Attorney General Bill West, Defendant Hamilton

County District Attorney Bill Cox, Defendant State of Tennessee Department of Human Rights, the Governor of Tennessee, Don Sundquist, U.S. Attorney Janet Reno, Vice-President Albert Gore, Jr., and members of the Clinton Administration.

Many of these parties are named in Plaintiff/Appellant's Count II before Honorable Thomas G. Hull.

b) Plaintiff/Appellant wishes to raise the issue of why Attorney James W. Gentry was allowed to represent the State of Tennessee before Judge Jarvis in a **CLANDESTINE** manner without being required to record his appearance on the Docket of Case No. 1:91-cv-354. Plaintiff/Appellant believes that a conspiracy to violate his right to sue the State of Tennessee existed between Judge Jarvis, then Tennessee Attorney General Charles Burson, Attorney James W. Gentry, and Tennessee Department of Environment and Conservation Attorney E. Joseph Sanders.

c) Plaintiff/Appellant wishes to raise the issue that the injunction of Judge Jarvis on December 28, 1992 in which he states:

> "Plaintiff Ernest A. Oliver ("Oliver") is ENJOINED from filing any further pleadings in this case and any further pleadings in the United States District Court for the Eastern District of Tennessee arising out of the facts set forth in this lawsuit;",

has served to allow Defendant Appellees, and especially their lawyers, to slander and libel Plaintiff/Appellant leaving him with no legal recourse to defend himself. Moreover no legal recourse is available to defend the health and welfare of his community from the **ORGANIZED CRIME** of Defendants/Appellees.

d) Plaintiff/Appellant wishes to raise the issue of why I was not allowed to speak at the sanctions hearing to defend myself. Judge Jarvis specifically stated at page 41, line 15, of the transcript at Docket #100, that Plaintiff/Appellant would not be allowed to talk about anything but the sanctions. I was never allowed to have any discovery of any kind throughout the entire case. Furthermore my attorney Bob Bradshaw did not object.

VI. The challenge of Judge Jarvis and Defendants/Appellees as to the timeliness of Plaintiff/Appellant's Appeal.

Judge Jarvis and Defendants/Appellees have both stated that Plaintiff/Appellant's appeal is untimely. Plaintiff/Appellant would like to bring to the attention that Rule 60, Federal Rules of Civil Procedure specifically states that:

> "...This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgement, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title

> 28,U.S.C., § 1655, or to set aside a judgement for fraud upon the court..."

Plaintiff/Appellant has charged Judge Jarvis and Defendants/Appellees with fraud and conspiracy against the Federal Court System and Plaintiff/Appellant. The record herein shows these allegations to be absolutely true. All Statue of Limitation matters here are tolled due to the continuing conspiracy, according to the authority of the Annotation of the American Law Review, 97 A.L.R. 137, where a Federal Judge was indicted 14 years after a conspiracy began because of an overt act which once again tolled the statue.

CONCLUSION

I have charged Judge Jarvis and Defendants/Appellees with fraud and conspiracy to violate my civil rights and of covering-up the illegal dumping of hazardous wastes in Chattanooga, Tennessee. My allegations of illegal hazardous waste dumping and environmental wrongdoing, have the support of Secretary of Labor Dr. Robert Riech, of Attorney Richard Jahn, Sr. and Attorney Tricia Dennis, both officers of the court. Ms. Dennis who represented my former Attorney Mark Light at the sanctions hearing of December 16, 1992, filed her brief to Judge Jarvis on December 15, 1992 at Docket #92. Here, she quietly points out all the evidence to show Judge Jarvis that his statement:

> "...Moose concludes that **all** of Mr. Oliver's allegations were "groundless..."(emphasis added)

was false, and states that this evidence was not considered by the Court. (See page 14 of the brief of Attorney Tricia Dennis at Docket #92).

Attorneys Dennis, Owings, and Light were all fully aware of Plaintiff/Appellant's filing at Docket #70 that clearly proves Judge Jarvis had filed a fraudulent opinion, yet not one lawyer would challenge the fraud and conspiracy being perpetuated by Judge Jarvis on Plaintiff/Appellant. Ms. Dennis, however, by her filing and pointing out in her brief at Docket #92, had quietly threatened Judge Jarvis with the "hard evidence" should he sanction her client Attorney Light. In turn, Judge Jarvis did no require Attorney Light to pay any monetary sanctions.

For the foregoing reasons, it is respectfully requested that Judge Jarvis's orders in my Case 1:91-cv-354 be set aside and that I be allowed to pursue my original citizen's suit to protect my community and clean-up the damage to the Chattanooga Summit Landfill.

It is also requested that my Count II in my present lawsuit before Honorable Judge Thomas G. Hull, Case No. 1:96-cv-380, be reinstated against all defendants.

I further request that this Honorable Court order an investigation into the fraud and conspiracy perpetuated on me and the Tennessee State and Federal Court system in this matter by Judge Jarvis, Judge Payne, and **ALL** the attorneys of record who joined the conspiracy to violate my civil rights herein.

The health and welfare of the general public both, nationally and internationally has been placed at risk by this conspiracy. The fact that the international community has been duped by former Chattanooga Mayor Gene Roberts, Vice-President Albert Gore, Jr. and the Clinton Administration into believing that the City of Chattanooga should be held out as an example of Environmental Excellence, is a disgrace.

The lessons of Watergate have yet to be learned in Tennessee. It is pure irony that twenty-five years ago this month, Watergate began, and President Richard Nixon stated on August 15, 1973 that:

> "I had no prior knowledge of the Watergate break-in. I neither took part in nor knew about any of the subsequent cover-up activities; I neither authorized nor encouraged subordinates to engage in illegal or improper campaign tactics. That was and is the simple truth."

I submit to this Honorable Court that Judge James H. Jarvis's statement: "...Moose concludes that **all** of Mr. Oliver's allegations were "groundless"...",(emphasis added) is just

as blatant a lie as was Richard Nixon's statement above.

In 1977, I was the first Forensic Scientist to blow the whistle on illegal activities in a State Police Crime Lab in Michigan. The Director of the Michigan State Police, Gerald Hough, stated that my allegations against the Michigan State Police were untrue. Seven (7) years later the Michigan Court of Appeals found that my allegations were "substantially true", and ordered my reinstatement with full back pay and seniority.(See 132 Michigan Appeals 558). Just before Colonel Gerald Hough was forced to retire, he admitted that **"ALL"** my allegations against the Michigan State Police were "factually accurate".

I submit that all of my allegations in this case are **"factually accurate"** as well, and deserve to be told and heard. The American Public is sick and tired of seeing its public officials lie, cheat, steal, and quibble about matters that have a direct and adverse bearing on the public's health and welfare. The American Public is equally tired of a legal system full of lawyers who have no integrity, no honor, and no guts to stand up to tyranny and wrongdoing. I expect to see justice served in this matter before this Court.

This case, which I call **"TENNESSEEGATE"**, has the potential to destroy the credibility of the City of Chattanooga and its former Mayor Gene Roberts, the credibility of the Governor

of Tennessee, Don Sundquist, the credibility of the Tennessee State and Federal Court Systems, the credibility of the offices of U.S. Attorney Janet Reno, the FBI and Justice Department, and the credibility of the offices of the Vice-President and the Clinton Administration on a national and international basis.

What right does Vice-President Gore, Janet Reno, and the Clinton Administration have to prosecute the Tobacco Companies for making a product that causes cancer, while at the same time they cover-up and protect the fact that McKee Foods Corporation, manufacturers of Little Debbie® products in Chattanooga, have been doing the exact same thing?

I submit that the extraordinary efforts to cover-up these facts including duping the entire international community into believing that Chattanooga is a City of Environmental Excellent deserving international praise, will soon be a matter of international scandal.

When William Colvin, Attorney for Defendant/Appellee Hydro-Vac Services, Inc., ran to Judge Payne in March of 1993 to dismiss his $5,000,000.00 "slap suit" in the face of Plaintiff/Appellant's Motion For Summary Judgement, Judge Payne stated on the tape recorded conversation previously placed before this Honorable Court in Plaintiff/Appellant's Petition For Writ Of Prohibition, Court of Appeals Case No. 97-5611, that: "...They want to quit; we want to get out of this thing; let'em go..."

Plaintiff/Appellant submits that as a member of the laboratory section of the American Public Health Association, I have a duty to the American Public **"NOT TO LET THEM GO"**.

The only chapter yet to be written in my manuscript called "TENNESSEEGATE", is what the Sixth Circuit Court Of Appeals decides to do about my request for justice, and protection of the general public.

I trust that the examples of justice shown to me by Tennessee State Circuit Court Judge Samuel H. Payne, and Tennessee Senior Federal District Court Judge James H. Jarvis, are not acceptable, and do not meet the standards required by this Honorable Court.

Respectfully Submitted,

/s/ Ernest A. Oliver

Ernest A. Oliver
Plaintiff/Appellant, Pro Se
58 Bohr Drive, Chattanooga, TN 37415
(423) 877-8723

PROOF OF SERVICE

The undersigned hereby certifies that a true and exact copy of this pleading has been served upon all parties and/or counsel listed below by depositing a copy of same in the United States Mail with sufficient postage thereon to carry same to its destination, addressed as follows:

William G. Colvin, Esq.
Attorney For Defendant/Appellee Hydro-Vac Services, Inc.
SHUMACKER & THOMPSON
701 Market Street, Suite 500
Chattanooga, TN 37402-4800

William H. Horton, Esq.
Attorney for Defendant/Appellee Golden Gallon, Inc.
Horton, Maddox & Anderson
One Central Plaza
Sixth Floor
835 Georgia Avenue
Chattanooga, TN 37402

James W. Gentry, Esq.
Attorney for Defendant/Appellee Guy M. Moose
Spears, Moore, Rebman & Williams
801 Broad Street, Sixth Floor
Chattanooga, TN 37402

This 11th day of June, 1997.

/s/ Ernest A. Oliver
Ernest A. Oliver
Plaintiff/Appellant, Pro Se

SHUMACKER & THOMPSON
Attorneys At Law

May 4, 1998

Mr. Ernest Oliver **VIA HAND DELIVERY & UPS**
58 Bohr Drive
Chattanooga, Tn 37415

RE: Ernest Oliver v. Hydro-Vac Services, Inc.
United States Department of Labor

Dear Mr. Oliver:

I enclose herewith a check drawn on the Shumacker & Thompson trust account in the amount of $25,018, payable to you. This check is being delivered to you in satisfaction of the Judgment entered in your favor in the proceedings before the United States Department of Labor in accordance with the Orders of November 1, 1995; January 6, 1998; and, February 5, 1998. I would appreciate it if you would sign the enclosed self-addressed, stamped envelope, acknowledging your receipt of this payment, as satisfaction of said Judgment. I want to take this opportunity to re-confirm our earlier communications to you that we do not see any connection between the satisfaction of this Judgment and your decisions with regard to any pending appeals.

I have attached to this letter a summary sheet which outlines how we calculated the amount owing through May 5, 1998.

Yours very truly,

"s/_____"
William G. Colvin
For the Firm

WGC:mdd

Enclosure

I hereby acknowledge receipt of check number 010454, in the amount of $25,018.00, in satisfaction of the Judgment entered by the United States Department of Labor.

"s/_____"
Ernest A.Oliver

JAHN & WEEKS

Law Offices

620 LINDSAY STREET, CHATTANOOGA, TENN.37403
423-756-8473/fax 423-266-1124

RICHARD P. JAHN, Jr.
JERRY WOODS WEEKS*
PAICE A. SEALS
*also licensed in GA

RICHARD P. JAHN, Sr.
OF COUNSEL

May 9, 1996

Mr. E. Joseph Sanders
Legal Services Director
Department of Environment & Conservation
401 Church Street
20th Floor
Nashville, Tennessee 37243-1548

Re: Your Faxed Letter to me of May 7, 1996
Regarding Ernest Oliver

Dear Mr. Sanders:

This will acknowledge receipt of your above fax.

The writer has had a sustained illness and only recently got out of Memorial Hospital in Chattanooga. I will be returning to my office shortly when I will deal in more detail with your inquiry.

Suffice it to say, I have very carefully looked into the matters set fourth in the "proposed" complaint. Mr. Oliver will not be a

party to that litigation. I am well aware of my obligation not to make unfounded or incorrect allegations.

In my opinion, the record is clear that your Mr. Moose has perjured himself when he stated to Judge Jarvis that the allegations of fact as their having been hazardous waste present at the Hydro-Vac site which found its way into the creek, was groundless. His record of inspection which he concealed was made prior to his sworn affidavit to Judge Jarvis, which Judge Jarvis apparently relied upon in finding that there was no basis for the historic complaint by Mr. Oliver.

Mr. Oliver has now been sustained in his allegations by the U.S. Secretary of Labor, namely Mr. Robert Reich, who has declared that Mr. Oliver is entitled to back pay or other damages. This, of course is inconsistent with the findings of Judge Jarvis, who never examined the record on the merits but whose opinion of December 20, 1992 was based on a technicality. He relied on the sworn affidavit of Moose that nothing was wrong, and this became the law of the case.

In short, my investigation incidates that Judge Jarvis was the victim of perjury and fraud which he relied upon. The truth is to the contrary. As a matter of law, his exsisting opinion and injunction should be set aside.

I will be glad to discuss this in more detail with you, including the sworn evidence out of the mouths of the States's own people, upon my return to the office which will be shortly.

Mr. E. Joseph Sanders
May 9, 1996

Meanwhile, I wolud suggest that you reviewthe record, including the extensive 280 pages of evidence contained in the so called "Hydro-Vac" summary which was fully assembled by Mr. Oliver and which we have found to be fully supportable as accurate and the true set of facyts involved.

As to whether or not a complaint in the draft form which you have apparently seen will be filed as such or whether there will be further modification must also be kept in mind. This is a study document based on what we believe to be the truth, solidly grounded in the law.

I am attaching herewith a copy of a Notice of a Right to Sue to Mr. Oliver from the U.S. Department of Justice, Civil Rights Division dated May 2, 1996. Mr. Oliver fully intends to pursue this right. You are hereby notified that he will be taking a discovery deposition of Mr. Guy Moose along with that of Mr. Ronald Balwin, Loan Officer for First Tennessee Bank in the course of these proceedings.

Very truly yours,

"s/_____"
Richard P. Jahn, Sr.

RPJ,SR.,/lg

Ernest A. Oliver
58 Bohr Drive
Chattanooga, Tennessee 37415
615/877-8723

~

CERTIFIED MAIL
#R 838 493 627
January 20, 1997

Honorable James H. Jarvis
United States District Judge
224 U.S. Post Office
and Courthouse Building
Knoxville, TN 37902

Re: Ernest Oliver v. Guy Moose, et al.,
Civil Action No. 1-91-0354

Dear Judge Jarvis:

I am writing this letter and attaching certain documents thereto because I am unsure of how to approach this matter.

In Case No. 1:96-CV-380, Honorable Thomas G. Hull makes the following statement in his order of December 18, 1996:

> "...because there is a suggestion in the record that Judge Jarvis may have relied upon a false affidavit in dismissing the previous lawsuit..."

I am now faced with the same problem I had in the State of Michigan in 1977 when I blew the

whistle on illegal activities within the Michigan Department of State Police, resulting in case law at 132 Mich App 558. This precedent-setting case resulted in collateral damage to persons on the fringe areas of the problem, by either loss of their jobs or loss of seniority.

I truly hope that you can help to prevent similar collateral damage here in Chattanooga, which has the potential to be enormous. Let's look at the facts.

1. United States Secretary of Labor, Dr. Robert Riech, has ruled in his November 1, 1995 Order that my firing from Hydro-Vac Services, Inc. was in violation of protected activity. Secretary Reich also ordered Hydro-Vac to reinstate me and pay damages to be determined. Secretary Reich also confirmed that Golden Gallon's gasoline contaminated dirt was landfilled in the Summit Landfill.

2. In his letter to Mr. E. Joseph Sanders, dated May 9, 1996, (attached for your review), Attorney Richard Jahn Sr. accuses Guy Moose of perjury when he states:

> "The record is clear that your Mr. Moose has perjured himself when stated to Judge Jarvis that the allegations of fact as to there

Honorable James H. Jarvis
United States District Judge
January 20, 1997

> having been hazardous waste present at the Hydro-Vac site which found its way into the creek, was groundless."

3. It is a fact that Moose withheld from Plaintiff and from this Court the fact that Moose had cited Hydro-Vac Services for allowing gasoline-contaminated soil, containing hazardous waste benzene, to migrate into the Chattanooga Creek. Just one (1) day later, Moose testified under oath in the Federal Labor hearing that there were no hazardous wastes present. It is also a fact that Hydro-Vac was cited by Moose's office on December 5, 1991, for "violation of the Tennessee Hazardous Waste Management Act", which is almost three (3) months before Moose's affidavit to this Court on February 21, 1992, wherein Moose stated Plaintiff's allegations were groundless.

4. It is a fact that processing **hazardous** wastes, and in particular **40 CFR Subtitle C hazardous wastes**, allows a citizen suit to be filed without a 60-day notice. See MARTIN v. KANSAS BOARD OF REGENTS, 32 Env't Rep. Cas. (BNA) 1944 (D. Kan. February 19, 1991), where the court held that (1) requirements for 60-day notice under Water Act and CERCLA are not to be interpreted too rigidly, and (2) no 60-day notice requirement

Honorable James H. Jarvis
United States District Judge
January 20, 1997

applies in a RCRA suit where hazardous waste violations are alleged.

5. At T69, line 22, of the Transcript of the December 16, 1992 sanctions hearing, Attorney Gentry establishes that he has practiced before the environmental bar since 1968 and was counsel in the Walsh case that established the 60-day notice. I ask you, who would be better informed than Mr. Gentry that no 60-day Notice is required when 40 CFR Subtitle C hazardous wastes are present?

6. Judge Jarvis, on page 13 of your **MEMORANDUM OPINION**, filed in my case Civ. 1-91-0354 on August 10, 1992, you state:

> "Moose concludes that **all** of Mr. Oliver's allegations are 'groundless'." (Emphasis added).

When confronted with the overwhelming hard evidence which I filed with your Court as substantial proof to the contrary, there are only two (2) possibilities which could have allowed you to make the sweeping statement that **ALL** of my allegations were groundless, namely:

a) You did not read any of my filings, which is the suggestion by senior attorney and officer of the court Mr. Richard Jahn, Sr., and which statement is also

confirmed by Honorable Thomas G. Hull in his order of December 18, 1996; or

b) You are the kingpin of State-sponsored, State-protected, State- authorized hazardous waste dumping in Tennessee, and are, therefore, a criminal.

7. On May 8, 1996, my Attorney, Richard Jahn Sr., told me that because there is absolute proof that Judge Jarvis's law school classmate, State Circuit Court Judge Samuel H. Payne, admits on a tape-recorded conversation that he did not read what I had filed before Judge Payne, there is a possibility that Judge Jarvis may not have read my filings before him as well. If this is true, Mr. Jahn sternly told me that **"JUDGE JARVIS MAY NOT HAVE KNOWN".**

8. On October 12, 1995, Ms. Alice Ford, a black investigator for the State of Tennessee Human Rights Commission, ruled that my civil rights had been violated by Chattanooga State Technical Community College ("CSTCC"), and ordered a "Cause" recommendation against CSTCC on October 13, 1995. On that same date, after being ordered to change her opinion to a "No-Cause", Alice Ford was fired and the entire Human Rights Office in Chattanooga was closed with only 25 minutes' notice.

Honorable James H. Jarvis
United States District Judge
January 20, 1997

9. Ms. Alice Ford is a true hero, much in the same light as Martin Luther King, Medgar Evers, and Rosa Parks. However, in Alice Ford's case a totally different perspective exists--no where in modern American history to my knowledge has a black person lost his/her job and had his/her civil rights violated as a result of defending a **white man**! You can just visualize this story on the Oprah Winfrey show!

10. Senator Fred Thompson has promised to investigate Alice Ford's "situation" (see enclosed letter), but so far he has done nothing and Ms. Ford is still out of her job.

11. In his Memorandum filed as docket #75, on September 23, 1992, Attorney Frederick Hitchcock attached a portion of a transcript from the deposition taken of me, where Hitchcock asks regarding my employment at CSTCC: "Who is your supervisor?" My answer: "Jan Cochran", (see enclosed transcript). From that point on, my teaching position at CSTCC began to deteriorate. Attorney Hitchcock was the co-Chairperson along with Dr. James Catanzaro, President of CSTCC, at the International Conference on Environmental Commerce "CONEC" held in Chattanooga in 1993. In addition, Attorney James L. Catanzaro, Jr. is the assistant counsel for Golden Gallon with Attorney Hitchcock. I can prove a conspiracy

exists to take away my teaching position at CSTCC, which is the subject of my Count I before Judge Hull.

12. Your order of December 20, 1992, enjoining me from "ever filing a lawsuit arising out of the facts set forth in this lawsuit" has provided a blank check for any defendant to violate my rights for the rest of my entire life, with no legal recourse. This is especially "chilling" in view of the fact that Moose lied in the Labor hearing and in his affidavit file in your Court, coupled with the findings of the U.S. Secretary of Labor that my allegations are true, and most importantly the health and welfare of the public continues to be threatened.

13. On May 17, 1995, Mr. Gary Lander, Counsel for McKee Foods Corporation, who bakes and distributes Little Debbie® products from the Chattanooga area, called me at my home requesting a meeting. The baking plants are directly adjacent to the Summit Landfill where benzene, mercury, and other hazardous wastes have been detected in the test wells at the Landfill.

Mr. Lander admits, on the tape-recorded conversation, that he has been aware of the contamination in the water but was not aware it

was in the air too. McKee was getting its water to make Little Debbie® products from wells closely situated to the Summit Landfill from 1990 thru 1995. Only late last year was the Eastside Utility ordered to take the water from the less-polluted Tennessee River.

Mr. Lander admits he had not seen the last two letters I mailed to Mr. Jack C. McKee, Executive Vice-President & COO of McKee Baking Company, which letters suggest Mr. Mckee did not take any action on the problem. Mr. Lander also confirms that I was in contact with Governor Don Sundquist on the matter as well.

14. On July 6, 1995, I wrote the enclosed letter to President Clinton, Registered Mail #R 429 878 846. It details some of the problems I have encountered trying to obtain justice here in the City of Chattanooga and Hamilton County. It also describes the situation involving the death of Larry Powell, a black motorist, at the hands of eight white Chattanooga police officers.

Again, some of the same persons who have violated my rights, are directly related to criminal activity which is being protected by your order of December 28, 1992.

Honorable James H. Jarvis
United States District Judge
January 20, 1997

15. As stated in my letter to President Clinton, Defendants Marsha Crabtree and Assistant District Attorney Bill West are on electronically unbroken tape recording admitting to violating the Tennessee Code in direct violation of my civil rights, and unless you set aside your December 28, 1992 Order and reinstate my Count II before Judge Hull, I will have no other recourse but to take this entire matter to the Sixth Circuit Court of Appeals and to an International audience.

16. I have attached for your review, the recent news article regarding the Clinton Administration and the Environmental Protection Agency. The EPA charges that:

> "Pennsylvania and some other big industrial states are reporting only a few major pollution violations, suggesting that inspectors in those states may be turning a blind eye to pollution problems".

I can prove categorically that the same situation exists in the State of Tennessee, specifically in Chattanooga (Hamilton County), the so-called "Environmental City", which is also the former District of Vice President Al Gore and the present District of Senator Fred Thompson (of Watergate fame) --both of these men are presently being named as opposing presidential candidates in 2000.

Honorable James H. Jarvis
United States District Judge
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17. The fact that the Clinton Administration has unknowingly awarded the City of Chattanooga and Mayor Gene Roberts an environmental award for Sustainable Development which is not deserved, could prove a major international embarrassment for the President.

18. The fact that Chattanooga Mayor Gene Roberts accepted an international award in Istanbul for Environmental Excellence with 90 other countries competing, and also a similar award from former U.N Secretary General Boutros Boutros-Ghali, despite the Mayor's full knowledge, protection, and cover-up of the illegal dumping operation of William Foxworth and Hydro-Vac, is **REPREHENSIBLE** and has the makings of an international scandal for international fraud!

I do not believe that this Chattanooga Environmental City "myth" would be well received in the international community today, especially by the friends of Boutros Boutros-Ghali.

19. The Collateral Damage to the City of Chattanooga, the so-called "Environmental City" could be especially embarrassing to President Clinton who vetoed the second term of U.N Secretary General Boutros Boutros-Ghali shortly

after Mayor Roberts received the award from the United Nations.

20. In a January 9, 1992 letter to me (enclosed) Vice President Al Gore instructs me to contact the Tennessee Department of Environment and Conservation--MOOSE'S OFFICE--the exact same office which has committed perjury regarding the illegal activity.

21. In a May 15, 1995 letter to me (enclosed with the President Clinton letter), Governor Don Sundquist, through his counsel, hides behind your December 28, 1992 Order and states:

> "After consulting with the Department of Environment and Conservation, we are satisfied that the issues that you have raised have been appropriately addressed by the Department and by the judiciary."

22. The attitudes which I have encountered from all supposedly responsible persons here in the State of Tennessee, is one of cover-up, silence, deception, and outright conspiracy to defraud and endanger the health and welfare of the general public. **THE STATUTE OF LIMITATIONS HAS BEEN TOLLED MANY TIMES** (see 77 ALR3d 725). As a member of the United States Public Health Service, I have a duty to

see that persons such as William Foxworth and Hydro-Vac, who have been allowed to illegally dump in the Chattanooga Area for the past eight years, answer for these criminal activities.

Attached for your review is the latest evidence by Defendant Eugene "Bunky" Wright catching Foxworth's illegal activities on Sunday, June 9, 1996. Mr. Wright's statement was:

> "The recent events at Hydro-Vac Services, Inc. seem to indicate a facility that is being haphazardly managed. Previous attempts have been made to ensure efficient operation, however, long term efficiency has not been achieved. Accordingly, the time has come to replace the "band aid" remedy approach with a permanent solution satisfactory to this office ensuring environmental safeguards to adequately protect the safety of the Publicly Owned Treatment Works (POTW), and, to prevent similar incidents that have occurred recently at Hydro-Vac Services, Inc."

23. On November 20, 1996, I met with Mr. Bob Diehl, Chairman of the Hamilton County Local Emergency Planning Committee ("Committee"), and other Committee members, who are responsible for enforcement of Federal SARA Title III, and discussed and provided absolute

proof of the continuing violations of William Foxworth and Hydro-Vac. In the agreed-to taped recorded meeting, I presented evidence to the Mr. Diehl and other Committee members of the 8-year illegal dumping operation which has been protected by Chattanooga Mayor Gene Roberts, the Chattanooga Police Department, the Hamilton County Air Pollution Board, the County Executive's Office, the Hamilton County Prosecutor's Office, the Tennessee Bureau of Investigation, the Federal Bureau of Investigation, the Office of the Governor of Tennessee, the State and Federal Court System, 3rd District Congressman Zack Wamp, Tennessee Senator Fred Thompson (of Watergate fame), and worst of all Mr. John Hankinson Jr. EPA Region IV Administrator in Atlanta--all of whom are **CHATTANOOGA PROTECTORS**.

24. The last monthly meeting of the Committee was held at **Hydro-Vac Services, Inc. and lunch was personally catered by William Foxworth, the dumper!** I have attached a copy of the reply of the Committee meeting and their Minutes for your review.

25. This leaves the following questions:

(A) DID YOU READ THE INFORMATION FILED TO YOU BY PLAINTIFF OLIVER?

Honorable James H. Jarvis
United States District Judge
January 20, 1997

(B) DID YOU KNOW THAT YOU WERE BEING LIED TO BY MOOSE AND THE THREE (3) LAWYERS: GENTRY, HITCHCOCK, AND COLVIN?

Conclusion:

SOMEONE is going to jail here. I am perfectly willing to be first if that is what it takes to focus the proper attention on this matter to see that justice is served and the public is protected from the illegal dumping and conspiracy.

To quote the words of Attorney Gentry in his letter to you of October 2, 1992 (enclosed), and **who was allowed to represent the State of Tennessee in your Court without an APPEARANCE**, I also "realize this correspondence does not constitute a pleading and I do not intend that it should".

I have filed the enclosed Notice of Appeal of Judge Hull's Order dismissing my Count II in Case No. 1:96-CV-380. If I do not hear from you before the time when I must file my brief with the Sixth Circuit, I will proceed outside the borders of Tennessee to obtain justice in this matter, including the international audience.

Honorable James H. Jarvis
United States District Judge
January 20, 1997

Let no person say that Plaintiff Ernest A. Oliver did not make every effort to limit the collateral damage which is inevitable in this matter.

Very truly yours,

"s/_____"
Ernest A. Oliver
Plaintiff, Pro Se

Encs.

cc: (All with Enclosures)

Vice President Albert Gore, Jr.
HAND DELIVERED
Senator Fred Thompson, U.S.Senate,
Cert. Mail #P 491 956 430
Mr. Gary Lander, Attorney, McKee Foods
Corporation, Cert. Mail #P 491 956 431

Supreme Court, U.S.
FILED
JUL 22 1998
OFFICE OF THE CLERK

No. 97-2067

In The

Supreme Court of the United States

October Term, 1997

ERNEST A. OLIVER,

Petitioner,

vs.

HYDRO-VAC SERVICES, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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ISSUE PRESENTED FOR REVIEW

Respondents submit that the questions presented, as phrased by Petitioner, were never presented in the lower courts. Respondents submit a proper statement of the issue to be:

1. Was Petitioner's Motion to Set Aside Orders untimely under Fed. R. Civ. P. 60(b)(3)?

2. Was Petitioner's Motion to Set Aside Orders pursuant to the savings clause of Fed. R. Civ. P. 60(b), supported by clear and convincing evidence of fraud on or by the court?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

Neither Hydro-Vac Services, Inc. nor Golden Gallon, Inc. has a subsidiary or parent.

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11 C. Wright and A. Miller, Federal Practice and Procedure § 2870 6

STATEMENT OF THE CASE

This Petition is the last gasp of one of four cases commenced by Petitioner Ernest Oliver ("Petitioner") based on events occurring during and following his five months of employment with Respondent Hydro-Vac Services, Inc. ("Hydro-Vac") in 1990. Petitioner's first claim against his former employer, Hydro-Vac, was brought pursuant to the whistleblower provisions of a variety of federal environmental statutes, before the U.S. Department of Labor, under docket number 91-SWD-00001 ("the Labor Action") on September 24, 1990. A decision in the Labor Action was entered February 5, 1998, from which no appeal was taken by either party. This action, CIV 1-91-0354, (U.S.D.C., E.D. TN) ("the Federal Action"), was commenced on August 26,1991, and asserted claims under 42 U.S.C. § 6972 (sic), 42 U.S.C. § 1983 and common law conspiracy (R. 1). Respondent Bill Foxworth is the President of Hydro-Vac, Respondent Golden Gallon, Inc., was a customer of Hydro-Vac and Respondent Guy Moose is a state regulatory officer with authority over Hydro-Vac. There were approximately eighty other defendants in the Federal Action who were never served with summons. Simultaneous to the filing of the Complaint in the Federal Action, Petitioner commenced an action in Tennessee state court, against the same parties, under docket number 91-CV-1711 ("the State Court Action"). The State Court Action contained claims identical to the claims under 42 U.S.C. § 1983 and common law conspiracy as contained in counts two and three of the Federal Action and contained no other claims. The State Court Action was dismissed for lack of subject matter jurisdiction, which dismissal was not appealed by Petitioner. In the fourth action, Petitioner brought claims against multiple Defendants, claiming that certain Defendants had not re-hired Petitioner as a result of age and sex discrimination, and that certain other Defendants, including some counsel of record in the Federal Action and one Respondent herein, had engaged in a conspiracy to affect Petitioner's employment, under docket number 1:96-CV-380 (U.S.D.C., E.D. TN.) ("the EEOC Action"). The EEOC Action was dismissed on the merits,

was appealed by Petitioner, and said Appeal was dismissed by Petitioner.

After the Federal Action was filed, summons were issued and served on only four of eighty-five Defendants as of December 31, 1991. These four Defendants, Respondents herein, filed Motions to Dismiss, Alternative Motions for Summary Judgment, and Motions for Sanctions, not later than January 29, 1992 (R. 2, 9, and 12). Petitioner, through his then counsel, responded at various times thereafter, and was granted additional time to respond when such request was made of the trial court (R. 16, 18-21, 28, 34). By Order of August 10, 1992 (R. 56), Petitioner's action was dismissed and a hearing on sanctions was scheduled. A Final Order entering sanctions was entered December 28, 1992 (R. 99), following the hearing on December 16, 1992. The Orders of August 10, 1992, and December 28, 1992, were supported by lengthy Memorandum Opinions of the trial judge, neither of which was published. (App. 5 and R. 98 respectively). No appeal was initiated.

Nothing was done in the Federal Action until January 22, 1997, when Petitioner filed his Motion to Set Aside Orders pursuant to Fed. R. Civ. P. 60, seeking a set aside of the Orders of August 10, 1992, and December 20, 1992 (*sic*, the Record shows no Order of that date), and December 28, 1992 (R. 101). The Motion was supported by a Memorandum of Law and seven exhibits, but included no affidavits or other sworn testimony (R. 102). The Motion was denied January 31, 1996, and Petitioner filed a timely Notice of Appeal to the Court of Appeals for the Sixth Circuit. Following briefing, the Court Appeals for the Sixth Circuit affirmed the Trial Court's action by Order entered March 23, 1998 (App. 1).

STATEMENT OF FACTS

Respondents cannot unravel or dissect Petitioner's statement of facts and cannot address all of the perceived misstatements of fact or law in the petition within the applicable page limitations.

Petitioner's statement of facts excerpts incomplete portions of the record from the Federal Action, the State Action, the Labor Action, and the EEOC Action, and contains factual assertions which are neither a part of the record in this action nor supported by appropriately authenticated documents and sworn testimony. His allegations of ". . . a conspiracy . . . so large as to infect the Tennessee State and Federal Court systems, the FBI, the Department of Justice, and offices of U.S. Attorney General Janet Reno, Vice-President Albert Gore, Jr., and the Clinton Administration" are so speculative and unsupported by any factual material that they do not warrant a response (Petition at 7). Therefore, Respondents except to Petitioner's statement of facts and law.

The record in the Federal Action shows that the Motions to Dismiss and Motions for Summary Judgment were based, in part, on purely legal arguments, and were supported by Affidavits of individuals with direct personal knowledge of a variety of regulatory investigations and enforcement actions taken against Hydro-Vac. Petitioner opposed these Motions with his own Affidavit, Affidavits of two former Hydro-Vac employees and voluminous documentary evidence which was neither authenticated nor explained by any witness under oath. From the commencement of this action on August 26, 1991, to the entry of the Order dismissing the case on August 10, 1992, neither Petitioner nor his counsel requested any voluntary discovery of any Defendant and never subpoenaed any witness for a deposition.

Among the allegations which are clearly contradicted by the record, Petitioner contends information was withheld from him in the Labor Action, which he claims affected the outcome in the Federal Action. (Petition at pp. 5-7, 9, 22). However, the information was not withheld; Petitioner simply did not ask for it (R. 25 at ¶¶ 11, 12).

Petitioner has initiated an incredible attack on U.S. District Judge Jarvis, claiming Judge Jarvis' Memorandum Opinion of

August 10, 1992, is fraudulent and that there is no ". . . evidence whatsoever to even remotely support . . . " a statement to the effect that Petitioner's Allegations "were groundless." (Petition at p. 8, 11-12, 20). Petitioner has either forgotten or chosen to ignore the plain substance of the Affidavit of Guy Moose (R. 25) in which Moose describes five investigations of Hydro-Vac by Moose's office which occurred between September 20, 1990, and December 21, 1990, some initiated by complaints from Petitioner. Petitioner's allegations generally involved claims that Hydro-Vac was illegally disposing of hazardous waste. These investigations showed respectively, ". . . samples were taken at that time which ultimately revealed that all samples registered below regulatory levels with regard to E.P. toxicity tests or TCLP Extract Tests"; "this allegation was investigated on the same day and found to be without substance," and "as a result of the allegations made by Oliver on December 21st, *another* investigation was made of HVSI's installation and *again* it was found that Mr. Oliver's allegations were *groundless*." (R. 25, ¶¶ 6-9) (Emphasis added). Judge Jarvis' finding is clearly and unequivocally supported by the record in this action.

ARGUMENT

Standard of Review

The leading case on the scope of review of the denial of the Motion based upon Fed. R. Civ. P. 60(b) is *Browder v. Dept. of Corrections*, 434 U.S. 257, 98 S. Ct. 56 (1978). There, the Court ruled that an appeal from the denial of a Motion pursuant to Rule 60(b) does not bring up the underlying judgment and may be reviewed only for abuse of discretion. *See* 434 U.S. at 263, n.7, 98 S. Ct. at 560, n.7.

The Court of Appeals for the Sixth Circuit has held ". . . in reviewing the denial of a Rule 60(b) Motion, we are limited to determining whether the district court abused its discretion in

denying the Motion." *Windsor v. U.S. Dept. of Justice*, 740 F.2d 6, 7 (6th Cir. 1984). Furthermore, reviewing courts ". . . may not consider the merits of the underlying judgment." *Windsor*, 740 F.2d at 7 (6th Cir. 1984). *See also Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991) and *Amerinational Industries, Inc. v. Action-Tungsram, Inc.*, 925 F.2d 970, 975 (6th Cir. 1991).

The only matter properly before this Court is whether or not the district court abused its discretion in denying Petitioner's Motion to Set Aside Orders, with its supporting papers, under Fed. R. Civ. P. 60(b), because said Motion was untimely or because Petitioner failed to satisfy the burden of establishing that fraud was perpetrated on or by the court.

1. Petitioner's appeal is untimely under Fed. R. Civ. P. 60(b)(3).

Petitioner's Fed. R. Civ. P. 60(b) Motion to Set Aside Orders was untimely. Because the Motion was untimely, the district court was correct in denying the Motion and the Circuit Court of Appeals was correct in affirming that denial.

Fed. R. Civ. P. 60(b)(3) allows a court, upon motion, to relieve a party from a final judgment obtained by fraud, misrepresentation or other misconduct of an adverse party. The rule further provides "the motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order, or proceeding is entered or taken." Because the Motion to Set Aside Orders was filed more than four years after entry of a final judgment in the trial court, it was untimely and was properly denied.

2. Petitioner's Motion pursuant to the savings clause of Fed. R. Civ. P. 60(b), was unsupported by evidence of fraud on or by the court and the Motion was properly denied.

If Petitioner's Motion is treated as an "an independent action" to "set aside a judgment for fraud upon the court", the district

court properly denied the Motion and the Circuit Court of Appeals properly affirmed that action.

Fed. R. Civ. P. 60(b) provides, in pertinent part, that "this rule does not limit the power of the court to entertain an independent action . . . to set aside a judgment for fraud upon the court." The district court was correct in denying the Motion under this "savings clause". As noted in 11 C. Wright and A. Miller, Federal Practice and Procedure § 2860, ". . . the burden of proof of fraud is on the moving party and that fraud must be established by clear and convincing evidence. Further, the fraud must have prevented the moving party from fully and fairly presenting his case." Petitioner has failed to meet this burden. Petitioner's Motion and supporting exhibits failed to present clear and convincing evidence of fraud; no such evidence was presented in the district court in response to the Motions to Dismiss and for Summary Judgment, and none was presented in his Motion to Set Aside Orders. Furthermore, there is no evidence that any fraud prevented Petitioner from "fully and fairly presenting his case," as virtually every document Petitioner cites as evidence of either alleged wrongdoing or alleged fraud by any party or counsel, is a part of the record in this case and is a public record of investigations of and enforcement actions against Hydro-Vac.

The topic of fraud on the court under this savings clause is discussed generally at 11 C. Wright and A. Miller, Federal Practice and Procedure § 2870. The concept of what constitutes fraud upon the court has been difficult for courts to articulate. No single definition has been sufficiently stated by any particular court. The case most commonly cited in this context is *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997 (1944). In that case, an attorney for Hartford-Empire, intended to mislead the court by having an article concerning a new invention or process published under the name of a supposedly disinterested third person, when, in fact, the attorney wrote the article as part of a plan and scheme to obtain a patent for the invention/process. During

patent litigation, the patent was upheld and Hazel-Atlas was ordered to pay substantial royalties to Hartford-Empire. Several years after entry of the judgment, Hazel-Atlas established by sworn testimony that the published article, which was relied upon by the patent office, the district court, and the court of appeals in the underlying patent litigation, had not been authored by its purported author, but rather had been written by the attorney for Hartford-Empire. In this case, the Court had no difficulty setting aside the original judgment on equitable grounds.

Appellate courts have recognized a requirement that the underlying judgment be obtained by means which are "manifestly unconscionable" in order for fraud to be a grounds setting aside a judgment. *See Hines v. Royal Indemnity Co.*, 253 F.2d 111, 113 (6th Cir. 1958), citing *Hazel-Atlas Glass Co.* Courts have also required that there be ". . . a showing of at least a reckless disregard for the truth." *United States v. Twitty*, 44 F.3d 410, 413 (6th Cir. 1995).

A clear expression of these requirements is in a case from another circuit, *DeVito v. Fidelity and Deposit Company of Maryland*, 361 F.2d 936 (7th Cir. 1966). There, the court noted

> . . . conclusory averments of the existence of fraud made on information and belief and unaccompanied by a statement of clear and convincing probative facts which support such belief do not serve to raise the issue of the existence of fraud, much less to carry the burden of resolving such issue.

361 F.2d at 938. Neither Petitioner's Motion nor his supporting papers satisfied these standards.

Notwithstanding Petitioner's allegations and claims of some kind of international conspiracy to "cover up" alleged hazardous waste dumping, all of his information which shows any

environmental wrongdoing by Hydro-Vac comes from public record of regulatory investigations and enforcement actions taken against Hydro-Vac. Fact and logic provide no support for Petitioner's allegations of a conspiracy.

Finally, it is important to note that Petitioner's Motion to Set Aside Orders under Fed. R. Civ. P. 60 was unsupported by sworn testimony containing facts supporting Petitioner's allegations.

It is apparent from this Petition that everyone who has disagreed with Petitioner's factual or legal analysis or perception has become a co-conspirator. In Petitioner's view, every regulator (state and federal), every judge (state and federal), and every elected or appointed official (state and federal), who disagreed with Petitioner, became co-conspirators to violate his civil rights and pollute and poison the people of North America and the world.

REASONS FOR DENYING THE WRIT

The Petition contains incomplete portions of multiple actions, and refers to many documents which are not appropriately authenticated supported by sworn testimony. Petitioner's Motion to Set Aside Orders in the Trial Court was not supported by properly authenticated records or sworn testimony supporting any of his claims. Petitioner has failed to demonstrate that "an United States Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power" as required by Sup. Ct. R. 10. Petitioner has failed to establish any basis for relief from the Trial Court Orders pursuant to Fed. R. Civ. P. 60.

CONCLUSION

Respondents submit the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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